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No. 14049

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United States
Court of Appeals
for the Ninth Circuit

PEOPLE OF THE STATE OF CALIFORNIA,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

SANTA MARGARITA MUTUAL WATER
COMPANY,
Appellant,

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Appellee.

Transcript of Record

In Two Volumes

VOLUME II.

(Pages 441 to 895, inclusive)

Appeals from the United States District Court for the Southern
District of California, Southern Division

FILED

FEB 19 1954

PAUL F. O'BRIEN
CLERK

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(Testimony of Allen C. Bowen.)

Q. And Exhibit 22 would show the portion of the basin which is occupied by the aircraft, would it?

A. It would.

Q. Now, isn't it a fact, Major, that during the last two years a large portion of Chappo and Ysidora basin has been changed, that is, the trees and vegetation have been removed for flood-control purposes and for the purpose of [459] conserving water?

A. There is a continuing program of phreatophyte control there on the basin.

Q. Do you believe, as Mr. Hall recommended for flood-control protection and water control, you would recommend that the foliage and vegetation growing on the basin should be removed?

A. I missed the first part of your question. Did you say someone had recommended?

Q. Yes, Mr. Hall.

A. Did you ask, had Mr. Hall recommended?

Q. I said, do you agree with him?

A. With his recommendation that phreatophyte be removed for the purpose of water conservation?

Mr. Shryock: I am not certain Mr. Hall made any such blanket recommendation as that. If you want him to pre-suppose that the recommendation was made——

Q. (By Mr. Dennis): Let's state it in a different way. In accordance with approved practices, it is the practice in San Diego County, is it not, in basins of the type of Chappo and Ysidora basin, to remove the vegetation growing on the surface

(Testimony of Allen C. Bowen.)

of the basin for the purpose of conserving water and for flood-control purposes, is it not?

A. It is the practice to remove the economically unprofitable vegetation from the surface of those basins for [460] the purpose of conserving water and for flood control.

Q. Have you any estimate as to the number of acres on which the vegetation has been removed on Ysidora basin for the purpose of conserving water and for flood-control purposes?

A. There, again, that program does not come under my supervision, so I have no basis to make an estimate on. I know it is a continuing program, though.

Q. And you know that too is a continuing program at Chappo? A. That is correct.

Q. Is it also a continuing program in O'Neill?

A. That is right. That is the upper basin, I presume, you are referring to.

Q. Now, I believe that you testified that there is no subsurface storage on the parcel of land which was acquired for the Naval Ammunition Depot, which consists of approximately 9,147 acres of land; is that correct?

A. I believe I specified that there was no subsurface storage along the thread of the Santa Margarita River where it borders the Naval Ammunition Depot.

Q. Do you know of any subsurface storage on the Ammunition Depot site?

A. Well, a portion of the Naval Ammunition

(Testimony of Allen C. Bowen.)

Depot is comprised of that Fallbrook surface which is deeply settled granite, commonly called decomposed granite, which naturally [461] stores a small amount of water.

Q. But you made no investigation to determine whether or not there is any subsurface storage on the site occupied by the United States Naval Ammunition Depot?

A. No. The subsurface storage on that property known as the Naval Ammunition Depot at Fallbrook would be very small.

Q. I believe that the map which is known as Map 1, which you furnished in answer to the Santa Margarita Mutual Water Company's interrogatories, shows that no portion of the site acquired by the United States Naval Ammunition Depot overlies any portion of the three basins or sub-basins.

A. That is correct.

Q. Now, you do not know of any diversions, surface or subsurface diversions, from the Santa Margarita River downstream from the Railroad Canyon gauging station to the farthest downstream northerly boundary of the Ammunition Depot?

A. Yes, I know of some diversions from the head of Temecula Gorge to the boundaries of Camp Pendleton.

Q. Approximately how many?

A. I would estimate there are 16 or 17 diversions from the stream lying between Temecula Gorge and the Camp Pendleton property.

Q. Major, are those diversions from the stream

(Testimony of Allen C. Bowen.)

or [462] water which is extracted and produced by wells?

A. By and large, diversions from the stream; direct flow.

Q. Direct flow?

A. Yes.

Q. Have you made any estimate as to the amount of water which the diversions take from the stream?

A. Well, there is one big diversion on the stream which takes a very large amount of the three second-feet which is in the stream, by virtue of the stipulated agreement between the Vails and the Government. The other 15 or 16 diversions are relatively small.

Q. Who was making the large diversion?

A. The big diversion there is the Fallbrook Public Utility District.

Q. Is that the one you had in mind when you said it was a large diversion?

A. That is right.

Q. The rest are all minor diversions?

A. By and large, they are minor. After all, there isn't much irrigable land in there. We have made surveys in there, as you know, for some of your clients, and the acreage is rather limited.

Q. When you use the term "diversions," you are referring to diversions both by riparian owners and by appropriation? [463]

A. That is right, all diversions.

Q. Now, excluding the Fallbrook Public Utility

(Testimony of Allen C. Bowen.)

District, would you say all the other diversions will extract less than 100 acre-feet per year?

A. No, I would not say less than 100 acre-feet. The Fallbrook Utility District——

Q. I said exclusive of Fallbrook.

A. I understood you. Fallbrook takes out about two and one-half second feet, and this summer all the rest that was taken out by other diversions, say, half a second-foot or a second-foot, which if taken out would be one acre-foot a day through the irrigation season there, which is longer than 100 days. I would say that it was well over 100 acre-feet per year.

Q. But it would be less than 200?

A. Well, it would be somewhere between—or, I wouldn't say it would be less than 200. It would be somewhere around there, I would say.

Q. And most of that water is diverted between May and November, is it not?

A. That is right.

Q. In other words, there is very little diversion between November and May? A. Correct.

Q. There is no occasion for diverting water except [464] for domestic use during the period mentioned, along November, December, to May?

A. You are speaking of the area between Railroad in Temecula Gorge and Camp Pendleton?

Q. Yes.

A. That is right. As a matter of fact, I think most of those people use their pumps in the winter season, and, certainly, there is no irrigation during

(Testimony of Allen C. Bowen.)

the winter or early spring. The only use is domestic.

Q. Now, attached to Exhibit 22, which I believe you testified was prepared under your supervision—— A. That is right.

Q. ——is a sheet entitled, "Sewage Effluent Discharges, Military Establishments and Installations within United States Military Reservation Boundaries, millions of gallons." Now, on the left-hand side it says, "Identity and Location," and under that we find "Camp Pendleton Plant 1," "Camp Pendleton Plant 2," "Camp Pendleton Plant 3," "Camp Pendleton Plant 4," and "Camp Pendleton-Camp Delmar 5 and 6." Can you tell me what plants those refer to, and the approximate locations? Do you have more than one sewage-disposal plant on the ranch?

A. Oh, yes. On the ranch—you mean by that Camp Pendleton? [465]

Q. Camp Pendleton.

A. Sewage-disposal plant No 1, for example, is located in grid co-ordinate 7285-B and -C.

Mr. Shryock: On what sheet of the four sheets which comprise Exhibit 22?

The Witness: On the Fallbrook sheet. Sewage-disposal plant No. 2——

Q. (By Mr. Dennis): Now, that is the plant that you referred to this morning, and placed across from the point of discharge into or just above Lake Sutro?

A. That is right. The effluent from that sewage-

(Testimony of Allen C. Bowen.)

disposal plant No. 1, located in the grid co-ordinate just given, is discharged into Lake Sutro and thence into Lake O'Neill.

Q. Now, on plant No. 2.

A. Sewage-disposal plant No. 2 is located in the 17 area. I am referring to the Oceanside sheet of Plaintiff's Exhibit No. 22, and it is located in grid co-ordinate No. 7182-N. That is sewage-disposal plant No. 2.

Q. Where is the effluent from that plant discharged?

A. The effluent from that plant is discharged back into the Santa Margarita watershed. This heavy black dash-dot line indicates the crest of the watershed as it runs through Camp Pendleton, and the sewage effluent is carried by a pipe line from the disposal plant already given on that last grid [466] co-ordinate. It follows this orange pipe line symbol, which discharges back into the Santa Margarita watershed, into this area, which has now become known as Infiltration Canyon, and it follows down the course of that canyon into the Ysidora basin.

Q. Now, plant No. 3.

A. Plant No. 3 is located in the 22 area, which is shown again on the Fallbrook sheet of Plaintiff's Exhibit No. 22, and it is located in grid co-ordinate 6583-W. That is in the lower reaches of the Chappo basin, and the sewage effluent is discharged directly into the river channel.

Q. And plant No. 4?

(Testimony of Allen C. Bowen.)

A. 4, 5, and 6 we grouped in Camp Delmar, which appears on the Oceanside sheet of Plaintiff's Exhibit No. 22, located in grid square No. 6375, in the area known as Camp Delmar.

Q. And where does that discharge? Are you through, Major?

A. The sewage effluent discharges from these three plants, 4, 5, and 6, directly into the Pacific Ocean. [467]

Q. That is the sewage effluent arising from the Naval Ammunition Depot is handled through the plant No. 1.

A. No. That has a separate plant on the Naval Ammunition Depot which is located here in Grid Co-Ordinate 7490-F Fox. That is shown on the Fallbrook sheet of Exhibit No. 22.

Q. That is the one you referred to prior——

A. I referred to that prior when it was located on your map No. 1.

Q. Are there any other sewage disposal plants in the Camp Pendleton and Santa Margarita River watershed that discharge effluent into the Santa Margarita River watershed?

A. No. Those are all the sewage treatment plants that treat water derived from the Santa Margarita River.

Q. Now I believe you testified this morning that the primary source of water for Lake O'Neill was from sewage effluent. Would you like to change your testimony in view of the fact that you since discovered that a considerable quantity of water

(Testimony of Allen C. Bowen.)

is diverted from the Santa Margarita River each year by means of the O'Neill ditch?

A. Well, I was speaking of the present at that time. No water has been diverted into Lake O'Neill from the Santa Margarita River this summer primarily because there has been no surface flow in the river. So as of right now and as of this summer the primary source of replenishment for water in Lake O'Neill is from the sewage effluent. [468]

Q. But there has been considerable water for the water year commencing in October of 1951 and terminating with 1952?

A. That is right. Last winter water was diverted.

Q. Do you know how many acre-feet were diverted during last winter?

A. I do not have those records with me. I don't know. I might say that water diverted from that structure on the Santa Margarita River may go into the O'Neill ditch and by-pass Lake O'Neill.

The ditch is so constructed that water which flows through it does not necessarily have to go into the lake. Some of it may by-pass and be discharged into the Upper Basin for recharge of the ground water supply.

Q. Have you maintained——

A. But those records, I might say, being taken at the head of O'Neill ditch doesn't necessarily reflect all of the water or indicate the amount of water, I mean to say, that goes into the Lake O'Neill.

(Testimony of Allen C. Bowen.)

Q. Have you maintained records to show what percentage of the water that is diverted by means of O'Neill ditch goes directly into Lake O'Neill and what percentage is diverted into the basin?

A. I have no such record.

Q. Are there any records on the camp?

A. Not to my knowledge. [469]

Q. That you know of?

A. Not to my knowledge, Mr. Dennis, no, sir.

Q. Do you know when they first started to allow any of the water that was diverted by O'Neill ditch to be diverted to the basin and not pass through Lake O'Neill?

A. Well, I understand that that was the custom of the ranch, the old management of Rancho Santa Margarita Y Las Flores that they customarily ran the surface flow through O'Neill ditch and either diverted it into the lake, if it was low, or by-passed the lake and allowed the water to go into the underground basin if there was sufficient water in the lake.

Q. Well, at any time that water was flowing through O'Neill ditch water would be flowing down the main channel of the Santa Margarita River through O'Neill Basin and Chappo Basin, would it not?

A. My information is that — the information that has been conveyed to me is that the entire flow during the season commonly called the irrigation season was diverted into O'Neill ditch. Now, I

(Testimony of Allen C. Bowen.)

don't know whether water was allowed to by-pass the O'Neill diversion or not.

Q. Well, now, do I understand you to say that the water was only diverted by means of the dam at the mouth of O'Neill ditch during the dry season and no diversions were being made during the wet season?

A. Well, I presume that diversions were made during [470] the flood season, yes, because that is when they would have enough water to replenish the lake.

Q. Then during the dry season the water that was diverted from the main stream by O'Neill ditch was used to supplement the supply in the basin during the wet season—the water was diverted for the means of filling O'Neill Lake or Lake O'Neill?

A. That is my understanding of the operation of that reservoir.

Q. But necessarily it had to be a surface flow in the river—there had to be a surface flow in the river at any time that you could divert water by O'Neill ditch.

A. If there was no surface flow in the river, as has been the case this past summer, why, naturally, you can't divert—where you have zero water you have zero diversion.

Q. All diversion by O'Neill ditch would be from surface flow? A. Of necessity.

Q. Now are you familiar with the wells that had salt water intrusion?

(Testimony of Allen C. Bowen.)

The Court: He has not testified to that.

Mr. Dennis: I was just wondering if he knew what wells suffered by intrusion.

The Witness: Well, I have been informed of the wells [471] that have suffered from salt water intrusion. I think Mr. Worts got those into the record.

Q. You know of no other wells that suffered salt water intrusion?

A. No. To my knowledge the testimony given by Mr. Worts that the wells had been salted—those that had been salted reveals all that suffered from increased salinity.

Q. Now have you made any breakdown to determine what percentage or how many acres of Class I land lay within the watershed of DeLuz Creek?

A. I don't believe that Exhibit 23 shows any Class I land in DeLuz Creek. If it shows any it certainly is a very small amount.

I see down here at the confluence of the DeLuz Creek and Santa Margarita River a very small area of Class I land is shown. That is actually a terrace formation there, level land which lies above the stream channel.

Q. Are any of the lands which overlie the surface of Chappo or Middle Basin being cultivated or irrigated today?

A. There is no cultivation or irrigation of those lands at the present time.

Q. Is there any cultivation or irrigation of any

(Testimony of Allen C. Bowen.)

of the lands overlying O'Neill or Upper Basin?

A. With the exception of a nursery at the hospital there and of course the lawns around the hospital there is [472] no cultivation or irrigation.

Mr. Dennis: I think that is all.

The Court: Any redirect?

Mr. Shryock: Yes, a few questions.

Redirect Examination

Q. (By Mr. Shryock): Major, Mr. Dennis questioned you in some detail as to Plaintiff's Exhibits 26 and 27 and I believe that the burden of your answer was to the effect that those two exhibits do in fact show the amount of water used in and out of its watershed at Camp Pendleton, is that correct? A. That is correct.

Q. And I believe you stated that they represent the water which is pumped from the underground basin? A. That is correct.

Q. Do the figures in those exhibits include any part of the duty of water of one acre-foot per acre for the 4,000-odd acres as to which you testified earlier as being covered with vegetation on the alluvial plain?

A. No. The figures given in the tables shown in Plaintiff's Exhibits 26 and 27 do not include any of that.

Q. Is it fair to say that they refer to pumped water?

A. They refer only to pumped water, that is right.

(Testimony of Allen C. Bowen.)

Q. Do you care to change your testimony as to whether or not however, this one acre-foot per acre duty of water [473] constitutes an actual use by the vegetation?

A. No, I don't wish to make any change in my testimony there. That one acre-foot per acre is a use over and above the rainfall which falls on the area and subsequently is a demand upon the ground water.

Q. Now I believe you also testified that there are some sheep, a considerable number of sheep browsing within the alluvial plain or in the valley, is that correct?

A. That is correct.

Q. What do those sheep browse on, Major?

A. Those sheep are grazing on the forage which grows on the surface of the alluvium, the surface of the underground basin. If it were not for the fact that those basins are water-bearing and make water available to plants growing on the surface throughout the summer season there would be little or no summer and fall range such as we are now harvesting.

Q. Is that vegetation economically undesirable or desirable?

A. It is economically desirable from the standpoint of agricultural economy. If that is to be considered as a cattle ranch that is the only source of range or grazing during the summer and fall season because the surrounding hill country produces a quick growing annual which matures early

(Testimony of Allen C. Bowen.)

and dies early and only gives you winter and spring range. [474]

Q. Now, I believe you stated that there is in effect a continuing plan of some sort for the removal of phreatophytes and other undesirable vegetation in the alluvial basin, is that correct?

A. That is correct. There is a continuing program for the removal of undesirable phreatophytes.

Q. Would that include removal of vegetation such as that growing where the sheep are grazed?

A. No. They are scattered—they are scattered stands of undesirable vegetation where the sheep are grazing but the area that they are grazing on are desirable forage areas, covered with desirable forage plants.

Q. The sheep don't graze on phreatophytes such as pussywillows and cat-tails and things of that nature, do they?

A. Not unless they are very hungry.

Q. Major, does the Soil Conservation Service classify areas of the nation and the world as to their climate, the prevailing climate?

A. Well, the Soil Conservation Service of the United States Department of Agriculture follows the general subdivision of climates that are accepted on a world-wide basis.

Q. Is the area in which the Santa Margarita River Watershed classified? A. Yes, it is.

Q. What is its classification?

A. It is classified as semi-arid.

Q. Now, Major, reference has been made to the

(Testimony of Allen C. Bowen.)

interrogatories which were submitted to the plaintiff and I believe you stated that you were in general charge of the preparation of answers to those various interrogatories.

Generally speaking, can you tell us the length of time which you were required to use to prepare those answers?

A. We were generally given about 10 days or two weeks in which to prepare the tables, maps and other data that were requested by the defendant.

Q. How many months before the final evolution of the pretrial order and exhibits were those answers to interrogatories prepared?

A. We had a series of interrogatories posed to us, the earliest of which were answered in January. The answers were filed, I believe, 7 January 1952. The Santa Margarita Mutual Water Company received the answers to their interrogatories, I believe, the 27th of June, 1952. That is a matter of record. I am not absolutely certain of that date.

Q. Now just by way of illustration let us take at random some of the exhibits mentioned in the pretrial order. For example, since it is within your own personal knowledge, the land classification map, Exhibit 23, and the land [476] utilization map, Exhibit 24, what length of time went into the preparation of those exhibits, Major?

A. Well, those exhibits, of course, were based upon field surveys which consumed a great many man-months of time.

(Testimony of Allen C. Bowen.)

The field work and the office work that went into the production of these exhibits here numbered 23 and 24 was very great.

Q. Now I believe you have stated that in the preparation of Exhibits such as 39, 40 and 41 you were obliged to rely on records maintained at Camp Pendleton and I believe you gave as an illustration records maintained by the Public Works Office, for example, and by the Post Supply Office?

A. Post Maintenance Office I mentioned.

Q. Post Maintenance?

A. Post Supply Office doesn't keep any of those records.

Q. So far as you know, Major, are they records maintained in the regular course of the business of those offices?

A. That is correct. Those records have been maintained by those offices over a period of years.

Q. Year after year? A. Yes.

Q. Your answer was yes? [477] A. Yes.

Q. And returning to the sewage effluent plants at Camp Del Mar. Are those plants at any distance from the Ysidora Basin itself?

A. Yes, they are a considerable distance. They are considerably removed from the Ysidora basin. I would say about two or two and a half miles as an estimate.

Q. Is there any existing pipe system at the present time through which that sewage effluent could be returned to the basin?

A. There is none.

(Testimony of Allen C. Bowen.)

Q. Would it involve, and I don't expect you to give any detailed figures, any considerable expense to construct such a system?

A. It would involve a very considerable expenditure.

Mr. Shryock: That is all, I believe, your Honor.

Mr. Dennis: If your Honor please, I neglected to ask Major Bowen two questions and I would like to ask them at this time.

The Court: All right.

Recross Examination

Q. (By Mr. Dennis): And that is table No. 1 in reply to the written interrogatory of the Santa Margarita Mutual Water Company, there is disclosed a number of acres in the watershed of [478] DeLuz Creek within the exterior boundaries of Camp Pendleton and I would like to ask the Major if that figure is substantially correct.

A. That figure is substantially correct, 6,869.6 acres in the DeLuz Creek watershed lying within Camp Pendleton.

Q. And would your testimony as to Fallbrook Creek be the same?

A. Yes, my testimony in regard to Fallbrook Creek would be the same. The acreage we show in the watershed of Fallbrook Creek lying within the Naval Reservation is 3,798.9 acres.

Mr. Dennis: That is all.

The Court: All right, sir.

Mr. Shryock: All right, Major, thank you. I ne-

glected to ask Mr. Grover if he had any cross examination but I thought Mr. Dennis asked him.

Mr. Grover: I think it may be understood, your Honor, if I have any questions I will speak up.

The Court: All right, we will take a short recess, gentlemen.

(Short recess.) [479]

The Court: Call your next witness.

Mr. Shryock: The United States calls Mr. Henderson to the witness stand.

PAUL F. HENDERSON

called as a witness on behalf of the plaintiff, being first duly sworn, was examined and testified as follows:

Direct Examination

The Clerk: What is your name, please?

The Witness: Paul F. Henderson, 704 North Cambridge, Portland, Oregon. * * * * * [480]

Mr. Shryock: That brings us to the point, your Honor, at which I am going to attempt to establish Mr. Henderson's relationship with Camp Pendleton and the Santa Margarita Valley and I shall proceed with that if that is agreeable to your Honor.

The Court: All right, proceed.

Q. (By Mr. Shryock): Now, Mr. Henderson, will you describe to the court the circumstances under which you became associated with any studies at Camp Pendleton and with the Santa Margarita River Valley portion of Camp Pendleton.

A. About the first week of January 1951 at 7:30 in the evening, I received a call from Washington,

(Testimony of Paul F. Henderson.)

D.C. asking me if I would accept the responsibility of making a hydrological study of the water supply on the Santa Margarita River.

As a result of that call I made a trip to Washington and was given the details of the hydrological studies and told what they wanted me to do.

As a result of that meeting in Washington a memorandum of agreement was prepared between the Commissioner of Indian Affairs, with the approval of the Secretary of the Interior, [505] and the chief of the Bureau of Yards and Docks of the Navy, for me to undertake the studies in the Santa Margarita River valley.

Q. Is the Bureau of Yards and Docks a division of the Navy? A. That is correct.

Q. All right, sir.

A. Immediately upon return to Portland I proceeded to Camp Pendleton and started setting up the office that is now known as the Office of Ground Water Resources.

Q. Now, you continued to retain your identity with the Department of Interior, is that correct?

A. That is correct. I am down here only on a loan basis.

Q. And that was a reimbursable basis between two Government departments?

A. That is correct.

Q. Well now, will you proceed?

A. When I arrived at Camp Pendleton——

Q. Were you on a full-time job status?

A. No, I was not. It was only such times as I

(Testimony of Paul F. Henderson.)

could afford to be down here from my existing assignment with the Bureau of Indian Affairs.

Q. Did you remain in a civilian capacity?

A. I did. [506]

Q. And will you describe the work which you then undertook after your arrival at Camp Pendleton?

The Court: Tell us further was that status changed where they gave you full time down here?

The Witness: I have never been down here full time. It was just as I could come down from my assignment in Portland.

The Court: All right, go ahead.

The Witness: I immediately proceeded to become acquainted with the watershed of the Santa Margarita River. I utilized jeeps. I utilized the automobile and to a great extent the so-called flying windmill.

In that way I was able to become very familiar with the entire watershed. I spent approximately four weeks the first time I was down here in going over and acquainting myself with the main physical features of the watershed. And at various times during the last or, since that time, I have made such trips as I thought were necessary to acquaint myself with certain details in connection with that work.

Q. (By Mr. Shryock): Now upon your arrival were you given any title?

A. I was given the title of civilian in charge of the office of ground water resources.

(Testimony of Paul F. Henderson.)

Q. Was that office organized and operating when you arrived? A. It was not. [507]

Q. And what did you have to do with the creation of that organization?

A. First I met with the post supply officer to find a place to open the office. He gave us the present location. It was then necessary to spend considerable time getting office furniture, office supplies, office equipment and to secure the proper personnel to start the investigation work in connection with all of the studies that I was to make.

Q. And did you remain in charge of the organizing work of that office?

A. I did for approximately six months, upon which—at which time I requested to be relieved of the responsibility of the personnel and administrative activities and to confine my work entirely to the engineering studies involved in the hydrological work.

The Court: By that time you had gotten all these men who testified here?

The Witness: Some of them, yes, sir. There has been quite a few changes in personnel.

Q. (By Mr. Shryock): At the time then you were so relieved of administrative duties. Did you have a functioning organization at that time?

A. I did, yes.

Q. Do you recall roughly how many personnel were employed then in the office? [508]

A. It would be a very rough guess—18 to 20.

Q. Major Bowen has testified——

(Testimony of Paul F. Henderson.)

A. I left—when I was relieved of the administrative and personnel duties Walt Turnbull, a civilian, took over.

The Court: In your personnel did you have military people?

The Witness: I had both military and civilian personnel.

The Court: All right.

Q. (By Mr. Shryock): Is the organization of the office as it exists today substantially as you left it?

A. Substantially, yes. It has been expanded somewhat.

Q. Now, in your work as a water engineer will you discuss the extent to which you are required to rely, or do you rely upon records of the United States Geological Survey?

A. In most cases the records of the United States Geological Survey as posted in their water supply papers provide the only records available.

Q. Could you discuss the accuracy and prestige of those records in your profession?

A. The studies as undertaken by the U.S. Geological Survey and reflected in their water supply papers are for the most part extremely accurate. If they have any question in regard to the accuracy they so state in their introductory data.

It has been my experience that those papers provide an excellent basis for water supply studies.

Q. And what generally is their degree of acceptance in the profession of water engineering?

(Testimony of Paul F. Henderson.)

A. I have known of no case where their data was not accepted.

Q. Have you to any extent relied upon those records in your studies made on the Santa Margarita River?

A. I have. The records on the Santa Margarita are the best, most complete set of records I have been able to obtain in any of my water supply studies.

Q. And have you done similarly in other water supply projects in other parts of the country?

A. I have, yes. I have used those for the last 30 years.

Q. Mr. Henderson, I show you a series of sheets purporting to cover water years from the year 1924-25 to the water year 1951-52 and I ask you to describe briefly what the nature of this document is.

A. This document is prepared directly under my supervision. Actually I did considerable of the plotting on these graphs myself. And in setting these graphs up I first determined the maximum amount of water which I could expect to use during the various years.

I have always set up on the graphs certain demands by Camp Pendleton and the Vail interests.

Q. And what was the source of the data? [510]

A. The original source of the data for the run-off curve was from the U.S.G.S. water supply papers—records. Also from the diversion records of the Camp Pendleton and the Vail properties.

(Testimony of Paul F. Henderson.)

Q. And has that involved your personal investigation and inspection of those records?

A. That has very definitely.

Mr. Shryock: If the court please, I should like to offer into evidence as Plaintiff's Exhibit No. 42, I believe, the document which the witness has just described.

The Court: Because I do not want to take up the time to read the paper, I wish you would tell me in a few words what that shows. That has been done with reference to other documents.

Mr. Shryock: If the court please, we propose to examine Mr. Henderson in considerable detail on this document.

The Court: All right.

The Clerk: Is this admitted?

The Court: Yes.

(The document referred to was marked Plaintiff's Exhibit 42 and received in evidence.)

Q. (By Mr. Shryock): Now, Mr. Henderson, will you proceed with an analysis of that document but, I believe first in answer to his Honor's question, will you state generally what the nature of it is and what it purports to demonstrate? [511]

A. In starting a water supply study the first thing you must determine is the amount of water which can be expected to be available over a period of years from the stream upon which your development is to occur.

Necessarily, we can't tell what we can expect in the future so we must study the past records with

(Testimony of Paul F. Henderson.)

the assumption that the same cycles or same relationships will occur in the future as have occurred in the past.

The Court: Over a period of years?

The Witness: Yes, over a period of years—as many years as we can obtain accurate records of.

Q. (By Mr. Shryock): All right. And what form then is the exhibit presented? Is it, first of all, on a given sheet what is represented?

A. Each sheet of the graph is one water year as used by the U.S.G.S. in their studies, namely, from October 1st through September.

Q. And how many years are covered as you described it?

A. I have covered from October 1924 to June of 1952. Of course the last year—these are taken from unpublished or unchecked records and are not from the water supply papers.

Q. And the standard water year in water practice of the United States is October 1 through September 30th, is that correct?

A. That is correct. [512]

Q. So that the last year is not entirely complete? A. That is correct.

Q. Now, do those sheets purport to show the same type of information for each water year?

A. They do.

Q. Then starting with your first sheet will you describe the nature of the information which is graphed on the sheet?

A. In attempting to determine the water sup-

(Testimony of Paul F. Henderson.)

ply that would be available for a development of the Camp Pendleton area, I took the run-off records as shown in the U.S.G.S. water supply records for the Ysidora gauging station. To that I added the measured diversions from the Santa Margarita and Temecula River. In this way I determined the amount of water which could be expected to be available for irrigation and any development which might be expected on the river.

Now in following this procedure of course there are hundreds of the so-called tea cup or teaspoon water users which do form a demand upon the stream but in setting up the water supply amounts as we might be able to use for additional development, I have not made any attempt to determine the demand which these hundreds of small water users have made in the past on the stream for the reason that these people will continue to form approximately the same draft on that stream. It would be almost an impossible task [513] to determine the amount of water that has been diverted from the various small streams and the wells that these people have used.

Q. Now to be a little more specific as to the items which are actually charted or graphed on these sheets, will you describe each of the three different lines or the four different lines which are illustrated?

A. On the water supply portion of the graph I have plotted—we will take the first year which is March 1924-25 water year, which would actually

(Testimony of Paul F. Henderson.)

be March of 1925, and on the vertical line indicated by the word "March", I have plotted the exact points showing the amount of water which would be available in that month as I have just described. I have done the same with each of the other months.

Now we could have circled that point for ready reference or for location on the graph but instead I just joined these various points by a line for ready identification and for the purpose of showing the trend as to whether it was increase or decreasing in flow. So that the chart—the sheet shows monthly figures.

Q. The sheet shows monthly figures?

A. That is correct, in acre-feet. For instance in the first water year, 1924-1925, the month of October, the flow was approximately 900 acre-feet.

For November the flow was approximately 600 feet. [514]

For December it was 700 feet.

For January it was 600 feet.

For February it was 1100 feet.

And for March it was about 1200 feet.

Then it drops down in April to about 1100 feet and so on throughout the year.

Q. Now, when you say flow are you referring to a particular point?

A. I am referring to the amount of water which we could expect the Santa Margarita River to provide for development in the manner which I have just explained, namely, that I used the actual flow at the Ysidora gauging station and added to it the

(Testimony of Paul F. Henderson.)

measured diversions from the Camp Pendleton and Vail areas.

The Court: Mr. Henderson, I don't think anyone has put in the record a proper definition of an acre-foot. Would you put that in the record?

The Witness: An acre-foot is that amount of water which would cover one acre one foot deep. The amount is 43,560 cubic feet.

The Court: My recollection was nobody had put that into the record. We assumed it from the briefs and other documents, but nobody put it in the record.

Mr. Dennis: I wonder if you could reduce that to gallons? [515]

The Witness: Take 43,560 and multiply it by $7\frac{1}{2}$.

Mr. Dennis: Approximately 326,000 gallons?

The Witness: (No answer.)

Q. (By Mr. Shryock): Also at this point, Mr. Henderson, could you state that when the term "cubic feet per second" or "second-feet," when either of those terms is used can you relate that back to acre-feet per year?

A. A cubic foot per second is a cubic foot each second. That amounts to a flow of two acre-feet in a 24-hour period. The acre-foot is volume and your second-foot is rate. [516]

Q. And that is the flow past a given point?

A. That is correct.

Q. So that a cubic foot per second, or a second-foot—and those are synonymous terms——

(Testimony of Paul F. Henderson.)

A. They are entirely synonymous.

Q. ———would result if it were a constant in some 724 acre-feet per year? Is that approximately correct?

A. Now, let me get your question again. A cubic foot per second——

Q. Let us say that is the yield of a given water source, a cubic foot.

A. A cubic foot per second—with 365 days in a year, a cubic foot per second would flow 2 acre-feet in a day, so it would be 2 times 365.

Q. Which is 730?

A. Would be 730 acre-feet in the year's time.

Mr. Dennis: That is approximate?

The Witness: That is an approximation. The actual figure, instead of being 2, is 1.98 and about four other figures after it. Common usage in every case, as far as I know, has been accepted as 2 acre-feet.

Q. (By Mr. Shryock): Per 24-hour period?

A. For the 24-hour period.

Q. Now, returning again to Plaintiff's Exhibit 42, what is the lowest line at the bottom of the sheet? [517]

A. The lowest line at the bottom of the sheet was established as a historical use or diversion for the Ysidora Mesa or what has been termed as Stuart Mesa in these proceedings. It has been referred to by previous witnesses as the Stuart Mesa. That is those lands lying outside of the watershed

(Testimony of Paul F. Henderson.)

that are being irrigated from pumping in the Ysidora Basin.

Q. Now, what about the line immediately above that?

A. The line immediately above that is the water supply graph, as I have just indicated. The line above that marked "Total Camp Pendleton," is the amount of water which Camp Pendleton would be entitled to divert from the stream for agricultural purposes, broken down on a monthly basis for military use instead of agricultural use, the basis of the total diversion being the acreage which Maj. Bowen stated was riparian to the stream, and the amount of water which that acreage would be entitled to receive if the water supply was available.

Q. In other words, that line marked "Total Camp Pendleton" does not purport to represent water which was actually there in those months, does it?

A. That represents the water which the riparian lands on Camp Pendleton could use if the water was available.

The Court: That includes lands which have been put to agricultural use in the past and those which it has been [518] testified to could be used for that purpose?

The Witness: That is correct, your Honor, in addition to the military use.

The Court: In other words, you assay the needs of Camp Pendleton, assuming that the Army were

(Testimony of Paul F. Henderson.)

in the business of agriculture, that it could legitimately use as a riparian?

The Witness: That is correct.

The Court: Is this a good stopping point?

The Witness: I have one more line, your Honor.

The Court: Go ahead. You have one more line. I thought you were through. I thought you had finished. Go ahead and finish.

The Witness: The upper demand line, marked "Total Camp Pendleton and Vail-Temecula" I have plotted on the basis of the riparian acreage on the Vail property riparian to the Temecula River. That again is based upon the acreages as testified to by Mr. Hall, plus the water use that would be required for their lands if the water supply was available.

The upper line then is the total demand on the stream if the water was available for the irrigation of the Ysidora Mesa or Stuart Mesa, the total Camp Pendleton demand, and the total irrigation demand for the Vail property riparian to the Temecula.

Now, I have made no attempt to determine the data or amount of water required by the other riparian users for the [519] reason that we did have the acreages accurately, nor did we have our studies—the studies taken to the point where we could state the number of acre-feet to be used on those lands. I have merely used the figures that we were reasonably sure of and have not attempted to

(Testimony of Paul F. Henderson.)

take the entire riparian acreage of the river itself.

Mr. Shryock: All right, sir.

The Court: All right.

Mr. Shryock: Thank you very much.

The Court: I want counsel to know and I want to say to these witnesses that if at any time either court or counsel think a stopping point has been reached and a witness thinks otherwise, do not hesitate to say so. I do not want to break the continuity. I thought, frankly, you had covered all of it.

The Witness: No, I apologize. I just wanted to bring that out.

The Court: Yes, we do not want to break the continuity. I did not look at the clock this morning, and it was 12:20 before we adjourned. I always wait for a good stopping point, and sometimes I do not know when a good stopping point is reached. You notice I always turn to counsel, and I don't mind if we go on for another five minutes or so, because it makes very little difference.

Mr. Dennis: Your Honor please, I want to say that I [520] noticed the first day of the record shows that sometimes there was a Kauba Ranch referred to. I think it should be corrected to state that in those instances we are talking about the Pauba Ranch.

Mr. Shryock: Pauba, yes.

The Court: Yes. I notice that when these gentlemen talk about these geographical places they very kindly spell them out, because we are not acquainted with the geography and, certainly, the

(Testimony of Paul F. Henderson.)

reporters are not acquainted with the geography of the Northwest. These men jump from Missouri to Klickitat, Washington, and you know you would have to have a Hammond's Atlas to follow them, and some of these places probably are not in the Atlas.

Mr. Shryock: We have tried to anticipate that, sir.

The Court: Yes. All right, gentlemen, 10 o'clock.

(Whereupon, at 4:40 o'clock p.m., Wednesday, November 5, 1952, an adjournment was taken until 10:00 o'clock a.m., Thursday, November 6, 1952.) [521]

November 6, 1952, 10:00 o'clock a.m.

The Court: I am sorry gentlemen, but I was delayed. I found a writ of habeas corpus on my desk, which I had to work on before I got on the bench. We will proceed in the case.

PAUL F. HENDERSON

resumed the stand as a witness for the plaintiff and, having been previously duly sworn, testified further as follows:

Direct Examination—(Continued)

The Clerk: This is Mr. Paul F. Henderson.

Q. (By Mr. Shryock): Mr. Henderson, at the conclusion of the proceedings yesterday, I believe you were in the midst of explaining Plaintiff's Exhibit 42. Would you now proceed to add any fur-

(Testimony of Paul F. Henderson.)

ther comments you would like to make in regard to what that exhibit purports to show?

A. There are one or two points which I might clarify in connection with Exhibit 42, and that is in connection with the reconstructed stream flow, in that the measured diversions include both pumping and surface diversions.

In my opinion, any subterranean basin, such as the Camp Pendleton basin, as well defined as it is, provides a very definite part of the stream, an integral part of the water supply. I therefore used pumping records as well as surface [524] diversions.

In regard to the demand for the Ysidora Mesa, or Stuart Mesa, I used the word "historical" diversions. By that I intended solely to point out that no additional demands were intended in connection with water diversions for that area.

These demands are shown in the graphs back as far as 1924 and were not intended as the diversions in those years.

With that I would like the report to show briefly what each of these pages indicates.

Taking, for instance, in the first year, 1924-1925, the month of June shows that the reconstructed stream flow was approximately 1,000 acre-feet, which is about one-seventh of the demand, the total demand for the Camp Pendleton area, or approximately one-sixteenth of the total demand for Camp Pendleton and the Vail properties riparian to the Temecula.

(Testimony of Paul F. Henderson.)

Referring briefly to water-supply year 1925-26, there was a fairly large flow occurring during the month of April, the reconstructed flow being approximately 14,500 acre-feet. However, that flow would not supply the riparian demand if all lands were under full development.

The next year, 1925-1927, was one of the very heavy run-off years. The flood occurred in February.

Q. You mean 1926-27?

A. 1926-27. I am sorry.

The flood occurred in February, the total reconstructed [525] flow being 81,700 acre-feet. In that month undoubtedly all riparian demand under full development might have occurred. [526]

The years '27-'28, '28-'29, '29-'30, '30-'31 are all what might be termed minimum flow years with the average monthly flows in the river varying between 1,000 and 2,500 acre-feet per month.

The flows in 1931-'32—in the month of February a small flood occurred with the reconstructed flow amounting to 31,680 feet.

The year '32-'33, '33-'34, '34-'35 were again low run-off years.

The year '35-'36—there was a small flood which occurred in February but the reconstructed run-off for that year would be approximately 7,500 acre-feet which would not supply the full demand for Camp Pendleton and the Vail area riparian to Temecula branch.

One of the largest run-off years occurred '36-'37

(Testimony of Paul F. Henderson.)

with a reconstructed flow of 56,030 acre-feet in February and 36,000 acre-feet in March. And undoubtedly these two months would have supplied full riparian demand.

This was followed by one of the largest single month run-offs which occurred during the water supply year of '37-'38, in March, with a recorded or reconstructed flow of 106,400 acre-feet.

The year '38-'39 had a comparatively low flood flow in February and similar in 1939-'40.

The year '40-'41 was another year of heavy flood flows which [527] showed a reconstructed flow of 53,570 acre-feet in March, 37,750 acre-feet in April.

We then entered the recent—no, I am sorry. The year of '41 and '42 was a low flow and we had another full water supply year in '42-'43 with floods occurring in the month of January, fairly heavy flow in February and another heavy flow in March.

We then entered the more or less drought period which got progressively worse with average flows during the year running from 1,000 to 1,500 acre-feet.

Now, the sole purpose of this graph as I have prepared it, is to show a comparison between the tremendous demand under full riparian development of all land within the watershed as compared to the very meager water supply which is available during most of the years of the period on record.

Q. When you gave as an illustration a couple of high run-off months in which you said that it undoubtedly would be adequate for the riparian de-

(Testimony of Paul F. Henderson.)

mands, were you speaking of the full prospective demand of all of the lands?

A. I was, yes, for that one month. Probably upon a full determination of all riparian lands within the watershed and the water demand for those lands there might have been sufficient water in the river in that one month to supply such a demand.

The Court: That was the heavy rainfall month in 1937 and [528] 1938?

The Witness: Yes, sir.

The Court: Wasn't that the year when we had floods all over Southern California. Those were heavy rainfall years, when we had floods in California and half of Imperial Valley was under water and half of Riverside County and Palm Springs was isolated. I remember it because I have a place there.

The Witness: That was definitely a high run-off year.

The Court: All the roads were washed out and everything else.

Q. (By Mr. Shryock): Now, Mr. Henderson, this study covers a period of some 28 years, is that correct?

A. In making this study I started with the water year 1924-25 for the reason that in my opinion that was the time when we began to have good records on the water supply of the Santa Margarita River and upon the diversions.

Q. Well, during that period of some 28-odd

(Testimony of Paul P. Henderson.)

years how many months did you find in which the run-off, in your opinion, would have been adequate for the riparian demands?

A. I didn't make an accurate check of that but it would be only 10 or 11 months in the entire period in which the reconstructed run-off in the Santa Margarita River would supply the full demand for riparian usage.

Q. All right. Now, Mr. Henderson, did you make any other studies of the stream from a different viewpoint? [529]

A. Yes, I did. My first requirement or my requirement when I reported to the Navy for this study was to determine what the safe yield at Camp Pendleton might be and in arriving at that figure I made a complete study of the entire watershed, checked the developments that have occurred over the last few years by using aerial photographs and making actual field recognizance.

After making that study and checking with the probable water supply that would be available it was my opinion that the safe annual water supply at Camp Pendleton from the Santa Margarita River, with full usage of the subterranean basin, is 12,500 acre-feet annually. [530]

Q. Now, did the construction of a dam figure in that conclusion?

A. Yes. I figured the construction of a small equalizing reservoir at the De Luz site. The purpose of that reservoir would not be primarily for storage, but would rather be installed merely to

(Testimony of Paul P. Henderson.)

spread the flood flows out for such a period of time as the water could be introduced into the subterranean basin underlying the Camp Pendleton area.

As shown by the graphs in Plaintiff's Exhibit 42, the flood flows in the Santa Margarita are very heavy for a very short period of time, which, if not controlled to some extent, would rush across the basin into the ocean, allowing very little time for passage into the underground basin.

Q. So that the dam that you projected in your computation was essentially a control structure; is that true?

A. That is all, what we term often an equalizing reservoir to spread out the flow for a sufficient period of time to introduce the water into the subterranean basin.

Q. Would that still permit any excess waters to flow across the surface plain?

A. During periods of extreme flood there would be considerable spill from that equalizing reservoir, allowing the water to spread out over the basins, over the pumping area.

Q. As a water engineer, can you say as to whether that [531] surface flow in those high runoff periods would have any particular benefit?

A. It would be very beneficial, yes.

Q. Now, what capacity in acre-feet had you figured in this structure?

A. I haven't made an exact calculation as to the capacity of the reservoir. However, it would not

(Testimony of Paul F. Henderson.)

have to exceed 50,000 acre-feet, but might be as low as 40,000 under an actual detailed study.

Q. In other words, a structure of what we might call unlimited capacity would not be a sound engineering project on a river of this kind?

A. In my opinion, it would not.

Q. Now, Mr. Henderson, so that the record may be very clear, there is not now and has not been up until now any structure of the type you describe within the limits of Camp Pendleton?

A. That is correct.

Q. And the only dam structure on the stream is the so-called Vail Dam at the present time?

A. That is correct.

The Court: You propose to take the water for storing from the river?

The Witness: That is right, yes.

The Court: And from the water allocated to the riparian [532] owners?

The Witness: That would be right, merely to hold enough to get it introduced into the subterranean basin by low flows rather than by extremely high flows, which would pass over and be wasted into the ocean.

The Court: That is right. It is not proposed to do season storing?

The Witness: That is right.

Q. (By Mr. Shryock): Mr. Henderson, are you familiar with the stipulated judgment which was entered into between the Vail interests and the Ranch?

A. I am, yes.

(Testimony of Paul P. Henderson.)

Q. Are you familiar with the minimum guaranty of water which that assures? A. I am, yes.

Q. What is that quantity?

A. That minimum quantity is three second-feet at the Temecula Gorge, which flowing for 24 hours would amount to six acre-feet per day.

Q. And is that the same as three second-feet?

A. Yes, that is.

Q. What would be the situation in Camp Pendleton if it were not for that three second-feet being there under the conditions which you ascertained as having actually occurred, as reflected in Exhibit 42? [533]

The Witness: Will you repeat that, please?

(The question was read.)

A. If it had not been for the requirements for the minimum flow at the Temecula Gorge, as set up under the stipulated judgment, there would have been very little, if any, water reach Camp Pendleton during any of the summer seasons, with the exception of the heavy flood flows.

Q. (By Mr. Shryock): Is there anything you would care to add, Mr. Henderson, regarding your studies as to the water supply yielded by this river system?

A. There is one point, as brought out by Mr. Worts in his testimony, that is, the necessity, to prevent damage to the basin, of maintaining a fresh-water barrier at the lower end of the pumping basin. In his testimony he has brought out the fact

(Testimony of Paul P. Henderson.)

that approximately 8,000 acre-feet must be left for that fresh-water barrier.

Mr. Shryock: Thank you. You may cross-examine.

The Court: Let me ask you one question. You may have given it in your testimony, but it has escaped me.

Under the stipulated judgment is there provision made for the storing by the Vails?

The Witness: That, as I remember, was covered in the stipulated judgment, yes, sir. I did not testify on that, but that is my understanding, under the provisions.

The Court: I have seen it and read it many a time, but [534] you know this is a long proceeding—

The Witness: Actually, under the stipulated judgment, both parties could store, in which case certain arrangements had to be made.

The Court: I see. I remember that it was called to my attention when we visited the premises as a part of the pre-trial proceedings, and there was water in the Vail Dam reservoir.

Cross Examination

Q. (By Mr. Dennis): Captain Henderson, as I recall your testimony, the line which is the second line from the bottom on the graphs which are Plaintiff's Exhibit 42 reflects the flow of the Santa Margarita River as measured at the Ysidora gauging station, plus the diversions which have been made

(Testimony of Paul P. Henderson.)

by the Vails and the O'Neills either in the basin or from the river.

A. I have also taken into consideration the storage in the Vail reservoir during such times as it was in operation and the diversions of Fallbrook. [535]

Q. And can we refer to that line as the flow line so that we will know what we are talking about? A. Yes.

Q. Now, as I understand the situation, all of the pumps which are maintained and operated by the Navy or operated by anybody pursuant to leases for agreement with the Navy in O'Neill Basin, Chappo Basin and Ysidora Basin have meters on them that indicate—that adequately and accurately record all the water which is pumped by those wells.

A. I understand that that is the case. However, I have not personally investigated each of the wells.

Q. And from whom did you obtain the information showing the amount of water which the Navy had diverted or extracted from wells located in the three sub-basins, three basins which was used in conjunction with the preparation of the flow line?

A. I obtained that data from the Camp Pendleton public works office or from their records.

Q. And from no other source?

A. No other source.

Q. And from whom did you obtain the information relative to the amount of water which the Vails had extracted by means of pumps from the Temecula or Pauba alluvial basin?

A. I obtained that information from Mr. Hall.

(Testimony of Paul P. Henderson.)

On one of the first trips that we made to the Vail properties, [536] at his office, he provided me with that information.

Q. Now, Capt. Henderson, I am calling your attention to Plaintiff's Exhibit 28 and ask you if the figures which are shown on that exhibit are the same figures which Mr. Hall gave you relative to the Vail extraction from Temecula Basin?

A. I can't testify to the fact that the figures on this tabulation are exactly the same as those given me by Mr. Hall without checking it against my rough draft and tabulation, which I understood was the basis for this tabulation.

However, I would have to check them before I could testify that they were accurate.

Q. Will you do that at a later date?

Now, I believe that you were present and you heard Mr. Hall's testimony relative to the amount of water which had been stored in Nigger Canyon or Pauba Reservoir since the time that the gates were closed sometime in 1948.

A. I was present at that testimony.

Q. Were the figures that he gave at that time the same figures which you used in constructing the graphs?

A. There again I would have to check the actual figures but I presume that they were because they were furnished by Mr. Hall—they were furnished me by Mr. Hall.

Q. And do you consider that the water which is extracted by the Vails by reason of their artesian

(Testimony of Paul P. Henderson.)

wells in the Pauba Basin is from the same source of supply as that which is obtained [537] from their surface wells?

A. That would be very difficult to testify to without extensive subsurface investigations in there which I am not qualified to answer.

Q. And while you were in charge of the office of Ground Water Resources you made no such investigation? A. I did not.

Q. And you know of no such investigation?

A. Other than the—no, I know of no other investigation through personal knowledge.

Q. Now, do you know whether the figures which Mr. Vail gave you and which you used in conjunction with the construction of these graphs, represented the water which was obtained from both the artesian wells and surface water or just what water that was.

A. The figures that I used were taken from both the artesian and surface wells.

Q. And did you take into consideration in the construction of the flow line that the water was diverted from the Santa Margarita River by means of the O'Neill ditch? A. I did.

Q. Now, calling your attention to the graph for the year 1951-52? A. '51-'52?

Q. Yes. That is the last page of the graph. [538]

A. Yes.

Q. Could you tell me for the period commencing the 1st of October 1951 and terminating on the 30th of June 1952 the amount of water which was ex-

(Testimony of Paul P. Henderson.)

tracted by the Navy from the three basins or sub-basins for that period?

A. I could give you that information by going into my work sheets but I do not have it here.

Q. Do you have your work sheets handy so you could pick them out during the noon recess?

A. I do. I think I could pick them out during the noon recess.

Q. Will you get that figure for me?

A. I will be very glad to.

Q. Will you also get me the figure for the amount of water which was diverted by O'Neill ditch during that same period? A. I will.

Q. And will you get me the amount or quantity of water which was impounded behind the Vail Dam in the Nigger Canyon or Pauba Reservoir for the same period?

A. Yes. That is beginning to get into a rather voluminous group of figures. I may not be able to get them all during the noon recess but we will have them as soon as I can get them.

Q. Would you say the various exhibits which the [539] plaintiff has introduced showing the amount of water extracted from the basins during that period and the amount of water which was impounded behind the Vail dam are correct?

A. As far as I know they are correct.

Q. You have seen those exhibits and they are correct?

A. As far as I know they are correct. I did not

(Testimony of Paul P. Henderson.)

take part in the preparation of them but I assume they are correct.

Q. And could you give us the figure of the amount of water which was recorded at Ysidora gauging station during the same period of time?

A. Yes, I will.

Q. Now, are you familiar with the——

The Witness: All of—pardon me, all of those figures you want was during the water year 1951-52 as far as we have the records?

Q. Yes, from October 1st, 1951 to June 30th, 1952.

A. Yes.

Q. Now, do you also have in your possession the rainfall figures for the same period showing the amount of precipitation and the dates on which it fell?

A. I did not go into the precipitation studies in connection with this work. Instead I relied upon the U.S.G.S. run-off records together with the other records maintained by the Vails and Camp Pendleton.

Q. As I understand your line which is entitled "Camp [540] Pendleton" on the graphs, that represents the total prospective agricultural use to which water could be put within the watershed and within the limits of Camp Pendleton?

A. I will have to correct that statement. That is not quite correct. The total Camp Pendleton demand line as shown on this graph, includes the Stuart Mesa demand as shown on the lower line, the total diversion as shown on the total Camp

(Testimony of Paul F. Henderson.)

Pendleton line is the actual amount of water that would be required to irrigate the riparian acreage as testified to by Major Bowen. However, in using the monthly distribution throughout the year I used a military distribution.

Q. Well, now, what do you mean by "a military distribution"?

A. Used the distribution on a monthly basis as taken from the actual diversion records on Camp Pendleton since it has been—since it has started diverting water.

Naturally, the military use would not follow an agricultural use because of the fact that in an agricultural use you have a very low demand in January and February with an excessive demand in July and August.

In a military usage that demand curve is not followed in that manner, being a much more uniform demand throughout the year.

Q. And in an agricultural use, Captain, the use would be based on the amount of water necessary to irrigate certain [541] types of crops based on an acre-feet per acre while in connection with the military use it would be based on a certain number of gallons per day per man which might be in the reservation.

A. That is correct.

Q. So that the methods of determining what would be the reasonable requirements of water for agricultural use would be entirely different from those which would be taken into consideration in

(Testimony of Paul F. Henderson.)

determining the reasonable amount that you would need for a military use? A. That is correct.

Q. And the two might be entirely different and foreign to each other?

A. That is correct.

Q. Now, during periods such as are shown for the months of December, January and February of 1951-52 there would be considerable rainfall within the watershed of the Santa Margarita River, isn't that correct? A. That is correct.

Q. And you wouldn't expect at that time that it would be necessary to irrigate crops which might be growing on the lands located within the watershed of the river?

A. That statement is not quite correct as shown by the irrigation demand at the Vail ranch. For instance they show a small usage during the months of December, January, February and March. [542]

The statement that the water usage during those months for irrigation is not as heavy as would be for a military use is correct.

Q. Now, when you refer to the statements of the use on the Vail ranch you were referring to Exhibit 28 or were you referring to——

A. No, I was referring to the increment between the two demand lines on Exhibit 42 of the plaintiff.

Q. And those demand lines represent average demand and not the demand, the total Camp Pendleton line for 1951-52 on Exhibit 42 which represents the average demand for the months of De-

(Testimony of Paul F. Henderson.)

cember and January and not the requirements which they would have needed for December, January and February of 1951-52, isn't that correct?

A. You mean for military use?

Q. No, for agricultural use. As I understand these lines, which are constructed as total Camp Pendleton and total Camp Pendleton plus/and Vail demand were constructed on the basis of the testimony of Major Bowen and his testimony went purely to agricultural use and he did not discuss a military use at all.

A. That is correct. The total demand for the year was the demand that Major Bowen set up as a result of his studies on the irrigable acreage riparian to the stream within the watershed of Camp Pendleton. [543]

He also set up the irrigation demand for those acreages.

Now, he did not discuss the actual per month use of that water. I believe it is shown on one of the plaintiff's exhibits, however.

Q. So that the total Camp Pendleton demand as shown by the line which you have constructed on the graphs, which is Plaintiff's Exhibit 42, simply show the amount of water which could be put to beneficial use on land lying within Camp Pendleton and within the boundaries of the watershed of the Santa Margarita River plus such water as might be used on the Ysidora Basin if and when all of those lands are devoted to agricultural use.

A. That is correct. [544]

(Testimony of Paul F. Henderson.)

Q. And that is an average line for each month? In other words, the line where it appears on Exhibit 42 for the water-year 1951-52 does not purport to show the amount of water which they would require for their lands for that year; it is simply an average for months for the 33 periods commencing in 1923 and terminating in 1952?

A. That is correct.

Q. So that actually, for the months December, January, and February of the water year 1951-1952, although all of the lands were actually devoted to agricultural use which could be devoted to agricultural use within the watershed of the Santa Margarita River, they would have required far less water than shown by your average line by reason of the fact that you would have normal or above normal rainfall for those months?

A. That is correct.

Q. Actually, with the amount of the flow which passed the Ysidora station for those months, you would assume that the rainfall was sufficient during that period so that irrigation of crops in that area would not be required or be necessary for the months of December, January, or February of the water-year 1951-1952?

A. That might be the case, depending upon the type of crops used. Ordinarily, I would say that where you have the rainfall that you would in those months, that you probably [545] would have very little irrigation.

Q. It would be impossible, would it not, for the

(Testimony of Paul F. Henderson.)

Vails and Camp Pendleton to utilize the water which passed the Ysidora gauging station during the months of December, January, and February of the water-year 1951-1952 without the erection of artificial dams and diversion structures?

A. No, that statement is not correct, in that, without an equalizing reservoir, certain water of those flood periods would enter the subterranean basin, which on a full use would have been drawn out very materially, and certain water would also be advantageous to the growing of crops in that area.

Q. Now, Captain, taking into consideration, and in constructing these graphs and the flow line, as I understood it, you intended the flow line to show the amount of water which was available during the various years shown on Exhibit 42 for use within the watershed of the Santa Margarita by the Vails and by Camp Pendleton?

A. And any other users that might decide to provide development within the stream area.

Q. But, as I take it, in constructing that line you disregarded any and all waters which were either in storage or which were available for use, which might be located in the three basins underlying Camp Pendleton and the basin that Mr. Hall testified to, that underlies the Vail properties?

A. That is correct.

Q. And yet, as I understand your testimony, you consider that the water which is located within the basins that I have just mentioned is a rather im-

(Testimony of Paul F. Henderson.)

portant source of supply to Camp Pendleton and probably also to the Vails?

A. Mr. Hall in his testimony brought out the point that, as far as the basin is concerned, it provides no source of water supply. The only water available from the basin is the flow of the streams into the basin.

Q. And that is your opinion also?

A. Yes, it very definitely is.

Q. Now, did you make any effort or any studies to determine the amount of water which was derived from the Santa Margarita River to recharge the three basins which underlie the plaintiff's property in the water-year 1951-1952?

A. In taking into consideration—I did not take into consideration what you might call the holdover storage in constructing that line, for the reason, as I testified, that this graph was merely to show the comparison between the tremendous demand for water on the full development of riparian acreage, as compared to the comparatively meager supply which would be available from the Santa Margarita.

Q. Captain, as I understand, during the water-year 1951-1952 there were no surface diversions on the Santa Margarita River or any of its tributaries of any consequence [547] with the exception of the Vail Dam at Nigger Canyon and the diversions which were made by means of the diversion dam in O'Neill Ditch.

A. That is correct.

Q. Now, any waters which may have passed over

(Testimony of Paul F. Henderson.)

the basins which are located on the Government's property, and which are recorded at the gauging station which is maintained at Ysidora, would be waters which could not in the course of nature be used to charge the three basins underlying Camp Pendleton?

A. The Ysidora gauging station is located at the lower end of the basins, and such water as passed them—passed that gauging station has already passed the basins.

Q. And, necessarily, could not recharge any portion of those basins? A. That is correct.

Q. And, as I understand it, any waters which passed the Ysidora gauging station drain directly into the Pacific Ocean and are lost and are waste water? A. That is correct.

Q. Now, in construction of the line which you say is total camp Pendleton and Vail demands, did you take into consideration all the demands of the Vail properties which they consider are riparian to the Santa Margarita River, including the portions of the Santa Rosa Grant which drain [548] into the Sandia and the De Luz watershed?

A. No, I did not. The area that I took into consideration in the construction of that demand line was that part of the Vail properties riparian to the Temecula River.

Q. Did you take into consideration any portion of the properties which are riparian to Murrieta Creek?

A. There is a portion of Pauba ranch which I

(Testimony of Paul F. Henderson.)

considered as being riparian to the Murrieta River, but I did not take into consideration any demand on the Santa Rosa section of the Vail properties.

Q. But you did take into consideration those portions of the property which are riparian or in the watershed of Murrieta Creek? A. Yes.

Q. In your opinion, does the gauging station which is maintained on Murrieta Creek correctly record all the surface and subsurface flow of Murrieta Creek at that point? A. Yes, it does.

Q. And, in your opinion, does the gauging station which is maintained at Railroad Canyon correctly record all of the surface and subsurface flow of the Temecula Creek, of the Santa Margarita-Temecula River at that location?

A. I do, with the exception of a very—perhaps negligible underground flow, which I think can be disregarded. [549]

Q. It probably would be less than one per cent?

A. Probably would be less than one per cent.

Q. Now, could any portion of the waters which pass the gauging station at Railroad Canyon gauging station serve any purpose to recharge the waters of the Temecula alluvial basin or the Pauba alluvial basin?

A. No, for the reason that the waters entering the Temecula Canyon have passed over the alluvial basins within the Pauba ranch or on the Murrieta watershed.

Q. And could any of the waters which are recorded at the Murrieta gauging station serve any

(Testimony of Paul F. Henderson.)

purpose so far as recharging the waters of the Murrieta basin to which Mr. Hall referred?

A. No, they could not, because of the fact that the testimony of Mr. Muehlberger was to the effect that the gauging station on the Murrieta was below the fault line of that area.

Q. Now, in respect to the construction of the line showing the historical use, as you say, of Ysidora basin, how did you obtain the information which you used in the construction of that line?

A. I obtained the diversions for that area from the office at Camp Pendleton, the Public Works Office.

Q. And was all of that water which was used on Stuart Mesa extracted from the basin or sub-basin which we [550] have designated as the Ysidora basin? A. It was.

Q. And no portion of that water was extracted from Chappo or Middle Basin, or O'Neill or the Upper Basin? A. Not to my knowledge.

Q. Now, were the same pumps which were used for the extraction of water from Ysidora basin used for both agricultural use and for camp-supply purposes?

A. I would not be in a position to testify to that question.

Q. Now, while you were in the Office of Ground Water Resources you made certain investigations in an effort to determine what the quantity of water was that was put to beneficial use on Stuart Mesa, did you not?

(Testimony of Paul F. Henderson.)

A. I took the flows of the water to the Stuart Mesa area from the records of the Public Works Office at Camp Pendleton. I did not personally go out and check to make sure that that was all used within the area designated.

Q. What records did they have in the Office of Public Works for your use?

A. There were the diversion records from those pumps.

Q. And they maintain records so that they could tell the quantity of water which was diverted to Stuart Mesa, as distinguished from the amount used within the military reservation for camp-supply purposes? [551]

A. It was my understanding that that water was segregated and the measurements were made, and those were the records I asked for and they supplied to me.

Q. And they did have such records?

A. According to my understanding.

Q. How far back did those records go?

A. I would again have to refer to my notes on that.

Q. You had no records prior to 1942 as to the amount of water?

A. That is correct. All the records I had were subsequent to 1942. I can't testify at this point whether they actually went to 1942, but they were subsequent to 1942.

Q. You are sure there were none prior to 1942?

A. That is correct.

(Testimony of Paul P. Henderson.)

Q. Now, you know, of your own knowledge, do you not, Captain, that the amount of——

A. I am sorry on that. I am in a civilian status.

Q. When I first met you I was introduced to you as Captain Henderson, and that seems to carry over.

The Court: Well, a captain is like a judge. Once a judge, always a judge.

The Witness: I just did not want to have the impression created that I am in the military service, as I am not. I am strictly a civilian.

Q. (By Mr. Dennis): You are on inactive duty?

A. On inactive duty. I do still hold a commission, but I am not here as military personnel.

Q. You do, however, know of your own knowledge and as a result of your investigation that the amount of acreage which was irrigated on Stuart Mesa varied from year to year?

A. Yes, I do know that.

Q. And you know that the quantity of water which was used in irrigating that property varied from year to year?

A. That is correct.

Q. And you know that the type of crops varied from year to year?

A. That is my understanding also.

Q. And you know that the location of the acreage which was irrigated also varied from year to year?

A. Not from personal knowledge on that, in that particular case, no.

(Testimony of Paul F. Henderson.)

Q. Now, in your opinion, would you say that it would be physically possible for the Vail interests to use any portion of the water which passed the Railroad Canyon gauging station for the period commencing December 1, 1951, and terminating April 30, 1952, without the construction of additional dams or artificial diversion structures?

A. Your question was, the water below the gauging station?

Q. The water which is recorded at the Railroad Canyon [553] gauging station, for the period commencing the 1st of December of 1951 and terminating with the 30th day of April, 1952, for that period, and for the water which passed that gauging station during that period of time, would it have been possible for the Vail interests to put that water to beneficial use on their property without the construction of additional dams on the river?

A. They could have installed pumps at that area and pumped it back on either the Pauba or the Santa Rosa ranch, but they could not use it as a gravity surface supply. [554]

Q. And during that period of time there was sufficient water or sufficient rainfall to show that the irrigation needs would be negligible?

A. Would at least be very small.

Q. Very small during that time? A. Yes.

Q. Now, for the same period the water which was recorded at the Ysidora gauging station, would it have been possible for the Government to put that

(Testimony of Paul F. Henderson.)

water to beneficial use during that period without the construction of a dam on the river?

A. They could not have used it through a gravity flow but they could have used it by pumping.

Q. And the only pumping that they would have occasion to use the water for would be for military purposes. Agricultural requirements during that period would be very negligible?

A. Probably very low, yes.

Q. And as a result of the investigations which were made while you were in charge of the Office of Ground Water Resources, are you in position to say whether or not the monthly requirements for military use are substantially the same as during the dry period of each water year as they were during the so-called wet period of the water year?

The Court: I think he answered that. He drew a distinction between agricultural use as having a peak—a high [555] and low, while the other is more or less constant. I think the witness used the word uniform but I was thinking of the word constant.

The Witness: That is correct.

Q. (By Mr. Dennis): There is a uniform demand?

A. Much nearer a uniform demand on a military use than on a strictly agricultural use.

The Court: But in postulating the two, you postulate the identity of quantity except one would go high and low and the other would be spread more uniformly.

The Witness: That is correct, your Honor.

(Testimony of Paul F. Henderson.)

Q. (By Mr. Dennis): So that for agricultural use during seasons when there is no rainfall or during months—during the rainy season when there is practically no rainfall, you would have approximately a peak agricultural use but during those periods when there is heavy rainfall you would have practically no agricultural use?

A. Yes, that is correct and as is reflected in the demand curve on Plaintiff's Exhibit 42.

Q. And would you say that for each period during the time when you constructed these various graphs that you would give the same answers relative to the water which passed Ysidora gauging station and Railroad Canyon gauging station and Murrieta gauging station as you gave to the year 1951-1952?

A. That is correct. [556]

Q. That is any and all waters which passed those gauging stations would serve no purpose so far as recharging the basins are concerned which are upstream?

A. That is correct.

Q. And I believe that you testified that you made a personal inspection of the watershed on numerous occasions?

A. Yes, I did.

Q. And you had an opportunity to observe the properties which were owned by the Vails and which lay upstream from the Nigger Canyon gauging station?

A. Yes. I walked over portions of them, drove over them in a car and flown over them.

Q. And as a result of your studies you have observed and know of your own knowledge that there

(Testimony of Paul F. Henderson.)

are large quantities of water collected in the watershed of the Santa Margarita-Temecula River which are obtained from run-off watersheds which join the main river at a point below the Nigger Canyon gauging station?

A. I didn't follow that question.

Mr. Dennis: Will you repeat the question?

(Question read.)

Mr. Dennis: Maybe I could simplify that.

A. I wish you would.

Q. In other words, your studies indicate to you that the water which passes the Railroad Canyon gauging station [557] in each and every year and in each and every month exceed the quantities which passed the gauging station at Nigger Canyon?

Mr. Shryock: If you know, Mr. Henderson.

The Witness: In a study of the U.S.G.S. run-off records I had occasion to compare the run-offs at Nigger Canyon gauging station and those at the Temecula gorge and according to my memory in every case there is more water available in flood periods, of flood flow, at the Temecula gorge than there was at the Nigger Canyon reservoir.

Of course in low flow periods on certain occasions the U.S.G.S. records showed more water at the Nigger Canyon reservoir than was available at the railroad gauging station.

Q. And in those instances that would be due to the diversions above the Nigger Canyon and——

A. It would be either due to diversions or due to the water entering the underground basin.

(Testimony of Paul F. Henderson.)

Q. Now also during periods of peak flow you have discovered, have you not, that the flow as measured at the Fallbrook gauging station exceeds the flow at the Nigger Canyon-Temecula gauging station?

A. I would have to go through the records to state that in every case that was true.

Q. You made no such study?

A. No, I made no such study. [558]

Q. Did you make any study to determine whether or not the flow at Ysidora gauging station exceeded the flow at the Fallbrook station during periods of peak flow?

A. If you confine that to periods of peak flow I would say that in all probability your gauging station at Ysidora would show a higher discharge than at the Fallbrook. However, in order to make a definite statement on that it would require considerable study and comparison between the flows at the two points. I made no such study.

Q. You made no such study. However, to make such a study all you would have to do is inspect the U.S.G.S. records of the flow at those stations?

A. That is correct. That is part of the exhibits before this court.

Q. And as I understand your testimony the climatological data was disregarded in connection with the lines which you constructed on these graphs?

A. That is correct. The lines were constructed purely from a stream-flow record as used by the

(Testimony of Paul F. Henderson.)

United States Geological Survey and published in their records.

Q. Now, I believe that you heard the testimony of Mr. Worts that the three sub-basins or basins underlying Camp Pendleton had a water holding capacity, a usable water holding capacity of approximately 40,000 acre-feet. A. That is correct.

Q. Do you agree with that figure?

A. I have no way of checking that figure.

Q. You made no investigations, or there were no investigations made under your office in the office of Ground Water Resources while you were in charge of it?

A. I made no investigation of that basin and none were made during the time that I was at the office of Ground Water Resources.

Q. And I believe you testified that during the periods of peak loads that the water rushes across the three basins with such velocity that there is very little chance for seepage?

A. That was not my testimony. My testimony was to the effect that if you could reduce the rate of flow across these basins you could induce more water into the underground basin.

Q. Provided that the basins were not full to capacity at the time the water was passing over the surface of the basin?

A. If the basins were full you couldn't get any seepage into them.

Q. While you were in charge of the office of Ground Water Resources did you have any studies

(Testimony of Paul F. Henderson.)

made or have you any information in your possession which would show the static water table in the three basins in question during the year of 1948-1949? [560]

A. All of that work was under the direction of Mr. Worts and I have no information concerning it and made no investigation of those static water levels.

Q. And you didn't take that into consideration when you constructed the charts which are Plaintiff's Exhibit 42?

A. As I previously testified I didn't take the time to make those investigations.

Q. Now, are you familiar with the term cyclic storage? A. I don't believe I am.

Q. And when you use the word "temporary storage" what did you have in mind?

A. Just for the purpose of reducing the rate of flow to the point where the water could be introduced into the subterranean basins. It was not the intention—I take it that you are referring to my statement concerning equalizing reservoir above the basin?

Q. Or your understanding of the term "temporary storage"? A. That is right.

Q. In other words, would you consider the storage of water in December for use in October of the next year to be temporary storage?

A. It was my statement that we would use the storage back of the equalizing dam to hold the

(Testimony of Paul F. Henderson.)

water just long enough to introduce it into the subterranean basins.

Q. And that would be held in back of the dam and [561] would probably all be introduced into the O'Neill basin and the upper portion of Chappo Basin?

A. That is correct.

Q. In other words, the clay blanket or cap which covers the lower portion of Chappo and Ysidora Basin would prevent any substantial amount of water percolating into those basins.

Mr. Shryock: If he knows whether such a clay blanket or cap exists.

Q. (By Mr. Dennis): You heard the testimony of Mr. Worts that there was a clay cap over Ysidora Basin and over the lower portions and Basilone Ford and Chappo Basin?

A. My memory of Mr. Worts' testimony is he stated that the soils in that area were much finer and that a clay cap did not exist. That is according to my memory of his testimony.

Q. (By Mr. Dennis): That is as to over Ysidora and the lower portion of Chappo?

A. I do not remember the exact extent of that finer soil.

Q. Are you familiar with the types of soil which overlie Ysidora Basin and Chappo Basin and Basilone Ford?

A. Major Bowen is a soil technologist and I did not go into that phase of the study in the least, depending entirely on information from Major Bowen.

(Testimony of Paul P. Henderson.)

Mr. Dennis: That is all. [562]

Mr. Shryock: Mr. Grover?

Mr. Grover: I do have a question at this time.

The Court: Yes.

Cross Examination

Q. (By Mr. Grover): Directing your attention to Exhibit 42 and the third line up there, "Total Camp Pendleton," I should like to ask if the total for the year—did I understand you correctly to say that the total for the year as determined by Major Bowen's testimony of the total acreage and the amount of irrigation water that would be necessary?

A. That is correct. In setting up the total Camp Pendleton curve I used the acreage, the riparian acreage as determined by Mr. Bowen's study, the water duty as determined by Mr. Bowen or by Major Bowen.

Q. So that even though a greater military use during the year could have been made. You regard yourself limited on this chart by the total irrigation use according to Major Bowen's testimony?

A. No, as a basis of this curve I started with the premise that the water which could be used on the Camp Pendleton area was the amount of water to which the riparian irrigable acreage would be entitled under agricultural use, but I divided the monthly demand on a military demand rather than a strictly irrigation demand. [563]

Mr. Grover: Thank you.

(Testimony of Paul P. Henderson.)

The Court: In other words, the total is the same by the year?

The Witness: That is right.

The Court: But there is no great deviation from month to month as there would be in the case you used the same water and applied it to the maximum agricultural needs?

The Witness: That is correct, your Honor.

The Court: All right.

Mr. Dennis: If your Honor please, I would like to have the opportunity of asking Mr. Henderson some questions this afternoon when he brings that information in that I requested.

The Court: Will you have that information this afternoon?

The Witness: I hope to have it. There was rather a voluminous tabulation.

Mr. Shryock: That brings me to inquire into the exact nature of our obligation to furnish information this afternoon.

As I understand it, in the first place it is confined to the water year 1951-52.

Mr. Dennis: That is correct.

Mr. Shryock: In the second place you want to know what figures we have on impounded water in the Vail dam.

Mr. Dennis: I wanted to get the figures from Mr. Henderson that he used in constructing the flow line for the year [564] 1951-52.

Mr. Shryock: And you are referring to the total Camp Pendleton-Temecula flow line?

(Testimony of Paul F. Henderson.)

Mr. Dennis: He said he took into consideration the flow at Ysidora during that period of time and took into consideration the amount of water which the Government pumped during that time and that he took into consideration the water that the Vails extracted that time. That he took into consideration the amount of water which was diverted at O'Neill ditch and the amount of water diverted by the Vail dam.

Now, I want to get each one of those figures so that I can compare them with the flow line which he has constructed on the chart.

Mr. Shryock: And the flow line you are referring to is the upper one.

Mr. Dennis: That is the line we said we would call the flow line which shows the total amount of water which passed the Ysidora gauging station, plus such diversion—major diversion, I believe the term was, and it is the next—the line which starts just below the figure 1 in October and has two peaks which show 22,520 on one and 31,310 on the other.

The Court: While you were reeling these off so easily the witness was worrying whether he can give you that information in such short time. We had better consult him.

Mr. Shryock: Do you feel you can supply that?

The Court: If it is not available then we will reserve the right to have you recall him later on, say tomorrow or whenever we convene after next week.

(Testimony of Paul F. Henderson.)

The Witness: I think I have it all in my brief-case. However, I may have some of the figures in Portland.

The Court: Suppose you tell us this afternoon after you come back what figures are missing.

The Witness: I shall, your Honor.

The Court: And then as to such portions that are missing we can make such arrangements as are necessary to have them here.

It may be there are corresponding figures available at the camp.

The Witness: That could be, yes, sir.

Mr. Shryock: If your Honor please, I have only one question. May we have it clear for the record that when we refer to the Railroad Canyon gauging station that is also the Temecula gorge gauging station, is it not?

The Witness: That is correct, they are identical.

Mr. Shryock: Thank you, Mr. Henderson, that is all.

The Court: I think, gentlemen, due to the fact it is only a few minutes to noon and I have other work to do, and I do not want to break into the continuity of this testimony in case the other information is available, I think I will let you go early to lunch. [566]

Mr. Dennis: If your Honor please, I wonder tomorrow if we might adjourn a little early?

The Court: Tomorrow afternoon?

Mr. Dennis: Yes.

The Court: Well, you remind me of that at the time.

Mr. Dennis: I am in this situation. My son got himself engaged and they are throwing a large party out at Beverly Hills and my wife says I have to be there.

The Court: That is a momentous occasion.

Mr. Shryock: I might say, your Honor, I certainly don't want to interfere with such a momentous occasion but we had been hopeful, not too hopeful, but somewhat hopeful we might conclude our case tomorrow.

The Court: I will tell you what we might do. We might cut the noon hour short if this information is available. I had the idea that possibly you were nearing the end. We will see what happens this afternoon and it may be possible tomorrow to cut the noon hour in view of the fact, as you already well know, that we will not hold court the following week. [567]

Mr. Shryock: Yes, sir.

The Court: And then, you see, whenever you finish, then Mr. Dennis need not present any testimony until when I come back from my Nevada assignment. That will give him nine or ten days in which to organize his material and supply any facts which he has not ready at the present time.

Gentlemen, and I think Mr. Dennis knows this, I am very strict in trying to conserve judicial time. That is not because I cannot enjoy leisure. As a matter of fact, I can enjoy leisure in several languages, as Commander Shryock has noticed by

noticing some of the foreign books I like to read, and foreign magazines, and so forth, to get away from the monotony of reading law all the time. But I am a member of a very busy court in a very litigious community, and in the 26 years I have been a judge in this court or the Superior Court I haven't found an easy way or easy hours yet. But at all times it is a flexible rule that is subject to the needs of the parties themselves, so there will be no loss to the litigants, and I am here to hear them, whether private persons or the Government.

So if you finish tomorrow, I will make this promise: no matter when you finish, once you say you have rested, you can go home until the following Monday or Tuesday. I will tell you when to come back, tomorrow. I will look to see what I have on a week from Monday. It may be that I will ask [568] you to come back on Monday rather than Tuesday. At any rate, you will have at least eight days between the time they close, if they close tomorrow, and if we carry over, you will know it will also not be very long. But I will co-operate with you, even if we cut the noon hour to 45 minutes.

Mr. Dennis: I think there is one question, your Honor, which is bothering us. The case was continued as to the Fallbrook Public Utility District to the 18th, and with the anticipation that the order of the Ninth Circuit is vacated, as it is continued to that time, we will proceed with Fallbrook then?

The Court: Mr. Swing is not here?

Mr. Dennis: He is not here today.

The Court: I will say that that was a rather optimistic speculation on my part. For one thing, however, I have not made my return as yet. For another thing, I don't mind telling you what is happening, because the Attorney General has notified me that they find it physically impossible to complete the presentation of the matter at that time. The order is rather unusual. I do not know why it is unusual. In the past, and you will remember the other one, they fixed a time for the hearing and they fixed a time for the return. Evidently they did such a hurry-up job in this instance that they merely said to answer within ten days, and they did not designate the ten days, and then did not say when the matter [569] is to be heard.

Mr. Dennis: I noticed that, your Honor.

The Court: You noticed it. I do not want to criticize the judges of that court, but I am pointing to the fact that there are certain deficiencies in that order. So a request will be made from Washington of the court that they fix a definite date for the return and that it be extended to allow the mechanics of physically producing the document and having it flown here to me to sign.

I may say also that the outline of the document—not of the brief—has been submitted to me, and I have approved it over the long-distance telephone. So that, when that is done, a time will be fixed.

I will therefore trail the other case behind you until I know more definitely, but I am certain now that the date of the 18th has become meaningless in view of what has happened.

Mr. Dennis: And we will continue to put on our case before any part of the Fallbrook case is heard?

The Court: That is right, because this case is severable, and, as I say, if there are any phases so far as between you and the others, we will keep the case open for that purpose.

In other words, gentlemen, we are trying these cases in the way in which for 26 years I have tried condemnation cases. I have tried them in the Superior Court and I have [570] tried them here, and where there are severable controversies you can try issues and send a group of attorneys home. You can say, "You go home and then come back later."

Then when we go to trial as against Fallbrook, I will send you home, because you do not want to hear all this testimony over again, and it may well be that Mr. Swing, having a record, will be content with calling the witnesses back and just cross examining them. If not, we will go through the same thing again, and while that is going on, I will send you home and call you back when any question of your rights is involved. My methods are very flexible, and I will bend them to the "shorn lamb," as the Bible says.

Mr. Dennis: So in the trial of Fallbrook, if the plaintiff is required to put this same type of evidence on again, I will not be required to be present?

The Court: No. I will protect your record. In other words, I am not going to waste your clients' money by going over it again so far as they are concerned. If that is the order, and if he insists on going to San Diego, I will get a place there. I

have a nice big storeroom there. This is off the record.

(Statement off the record.)

The Court: If he insists on doing it, as I say, I will take him there where I can get a courtroom for free.

Mr. Dennis: Thank you, sir. [571]

Mr. Shryock: Thank you.

The Court: I might also say that I have imported a judge for San Diego. The calendar is in bad condition there, and a judge from Honolulu has been flown here, who is sitting in the little courtroom now, and beginning next month Judge McCulloch will be there, and he will be there until March 1st. At that time possibly I might have the use of that little courtroom which has taken me ten months to secure. Then the second hearing room might be available, but I do not propose to continue this case until that contingency, because I want to get through with it as quickly as I can.

All right, gentlemen, two o'clock.

(Whereupon, at 12:00 o'clock noon, a recess was taken until 2:00 o'clock p.m. of the same day.) [572]

Thursday, November 6, 1952, 2:00 p.m.

The Court: Before you start, one advantage of having this case in the headlines is that the newspapers keep me informed of what is going on.

Mr. Ainsworth just called Mr. Austin of the Times and Mr. Austin called me and informed me that the time for appearance in the Court of

Appeals has been changed to the 24th of this month. So, that works in with the plan that we were talking about this morning.

You may proceed.

Mr. Shryock: Your Honor, at the conclusion of the proceedings this morning the preceding witness, Mr. Henderson, was to determine whether or not he had here in Los Angeles certain information which Mr. Dennis requested.

Upon investigation he finds that all or practically all of that information is up in Portland, Oregon.

We have two suggestions to make, your Honor. One would be that upon his return to Portland Mr. Henderson could obtain that information, record it and send it to us so that we could submit it to Mr. Dennis. That is No. 1.

Or, if that were not acceptable, that when and if Fallbrook is back in the case, necessarily Mr. Henderson's appearance would be required. He then could question the witness on that point. [573]

Mr. Dennis: I think that we will be satisfied with that.

The Court: Let me suggest that the first suggestion is much better because then I can leave it open and just say the examination is concluded subject to your examining this information and that if by reason of the information you receive you desire additional testimony we will bring him down here for you at any stage of the case before it is closed.

Mr. Dennis: That is satisfactory, your Honor.

The Court: Maybe the information will be so obvious you won't need any cross examination.

Mr. Dennis: I anticipate that it will be as you mention, obvious, and I won't have to ask any questions.

Mr. Shryock: We shall adopt the first suggestion of the court.

The Court: If he is through and wants to go back to Portland he may.

You may proceed.

Mr. Shryock: Mr. Witman, will you take the stand, please?

HENRY W. WITMAN

called as a witness by the plaintiff, being first duly sworn, was examined and testified as follows:

The Clerk: State your full name.

The Witness: Henry W. Witman. [574]

Direct Examination

Q. (By Mr. Shryock): What is your residence address, Mr. Witman?

A. 108 South Pacific, Oceanside, California.

Q. And what is your occupation?

A. I am a rancher.

Q. You operate a lemon grove?

A. Yes, sir.

Q. Now, Mr. Witman, have you in your lifetime been connected with the property known as Rancho Santa Margarita?

A. Yes, sir.

Q. When did that connection first begin?

A. In 1920.

(Testimony of Henry W. Witman.)

Q. Do you recall what month, approximately?

A. I believe it was September, either August or September of 1920.

Q. And in what capacity did you establish a connection with the Rancho Santa Margarita?

A. I came as a tenant.

Q. And what, approximately what acreage were you leasing? A. Approximately 1500 acres.

Q. And for how long did that landlord-tenant relationship continue? A. Until July, 1922.

Q. And what happened at that time?

A. I went to work for Rancho Santa Margarita.

Q. In what capacity?

A. I was foreman of the farming operations.

Q. And did you have anything to do with the cattle on the ranch? A. At that time no, sir.

Q. And when you came to the property in 1920 did you acquire any familiarity with the ranch as a whole—in general? I mean its physical features?

A. Yes, I did.

Q. For example was there any lake on the ranch in 1920? A. Yes, the O'Neill Lake. [576]

Q. How recently have you seen the O'Neill Lake? A. Why, about 90 days ago.

Q. Could you say whether or not it is substantially the same as it was when you first saw it in 1920, with the exception of possibly raising the levee? A. It is exactly the same.

The Court: You mean the works have not been changed?

The Witness: The levee has been raised, sir.

(Testimony of Henry W. Witman.)

The Court: Oh, yes, I forgot that. Except for that?

The Witness: The location is exactly the same.

Q. (By Mr. Shryock): Now, you continued as superintendent——

The Court: I don't remember, from the description and from what we saw, whether the contour of the lake is natural on all sides except on the side where the levee is run.

Q. (By Mr. Shryock): Could you explain that to the court?

A. Yes, it is in a natural contour except where the levee was put across.

The Court: That was my recollection. Thank you.

Q. (By Mr. Shryock): Now, taking the period between 1926 and 1942, in what capacity were you connected with the Ranch?

A. Well, I was made general superintendent in 1926, and in 1936 I was made general manager.

Q. Of everything? A. Yes, sir.

Q. And in those capacities, Mr. Witman, did you come to be acquainted with all of the physical features of the ranch, the properties, what was on them, and the uses to which the lands were put?

A. Yes, sir.

Q. Are you familiar with the areas known as Stuart Mesa and South Coast Mesa?

A. Yes, sir.

Q. Now, I believe you say you became general manager in 1936 or '37? A. Yes, sir.

(Testimony of Henry W. Witman.)

Q. Up until that time had either of those mesas I have mentioned been cultivated?

A. Yes, sir.

Q. Had either of those mesas been irrigated?

A. No, sir.

Q. During your tenure as the general manager of the ranch, would you state what, if anything, was done with respect to those mesas as to irrigating them for agriculture?

A. Wells were drilled in the Ysidora basin and pipe lines were installed on both sides of the river, booster pumps, to the mesa lands on either side, and distributing lines were installed. [578]

Q. Now, when you say "the river," what river do you refer to?

A. The Santa Margarita River.

Q. Do you recall what the approximate acreage of the Stuart Mesa is?

A. Approximately 1200.

Q. And what about South Coast?

A. In the neighborhood of 600.

Q. If you know, of the 1200 in Stuart, about how much of that is outside of the watershed of the Santa Margarita River?

A. Well, I think approximately three-fourths of it is outside of the Santa Margarita watershed.

Q. Perhaps 900 acres? A. Yes.

Q. And what about South Coast?

A. About half of the lands that we irrigated were; about half outside the watershed.

Q. Now, when this irrigation was begun, how

(Testimony of Henry W. Witman.)

much of the 1200 acres on Stuart Mesa was put to irrigation?

A. The entire area was put into irrigation in 1938. The wells and pipe lines were installed in 1937, in the winter of 1937.

Q. And in the spring of 1938 did you actually begin their use? [579]

A. We began irrigating the entire mesa, yes, sir.

Q. And does that apply to South Coast?

A. No, that was the following year.

Q. Then in 1939 did you start irrigating the South Coast Mesa? A. Yes, sir.

Q. Was that continuous as long as you were connected with the Ranch Santa Margarita?

A. Yes, sir.

Q. Every season? A. Yes, sir.

The Court: How did you irrigate, by ditches or pipe lines?

The Witness: Pipe lines, cement pipes, and short runs of earthen ditches, by pipe lines in most cases.

The Court: Did you at any place because of the terrain have to use those surface pipes with flexible joints?

The Witness: Not on the mesa, sir; no, sir.

The Court: Did you use them anywhere on the ranch?

The Witness: Yes, we did. We used them some places in the valley ranch.

Q. (By Mr. Shryock): Now, Mr. Witman, you mentioned wells were drilled. Were those wells drilled with any specific purpose in mind?

(Testimony of Henry W. Witman.)

A. They were drilled for use on those mesa lands. [580]

Q. And from what source did the water come through those wells? Where was the water pumped from?

A. From the lower Ysidora Valley, the lower Ysidora basin. [581]

Q. Have you been connected with the property which was known as Rancho Santa Margarita down to the present time?

A. Yes, sir.

Q. In what capacity are you now connected?

A. I am a tenant.

Q. You have made the full cycle?

A. Yes.

The Court: Was that a demotion or promotion?

The Witness: Just where I started.

Q. (By Mr. Shryock): Of what lands are you a tenant, Mr. Witman?

A. Lemon grove.

Q. Well, is that one lemon grove?

A. Both. Well, it is the entire lemon acreage, part of which is on the Stuart Mesa and part of it is on South Coast.

The Court: Is that your old lemon grove? Is that the same lemon grove you had years ago?

The Witness: Well, it was planted in 1939, Judge.

Q. (By Mr. Shryock): And does a part of that lie inside the watershed?

A. Yes, sir.

Q. How many acres would you estimate?

A. 65, I think.

Q. And how many acres outside the watershed?

A. 40. [582]

(Testimony of Henry W. Witman.)

Q. Could you operate those lemon groves without water, Mr. Witman? A. No, sir.

Q. You have been intermittently familiar with the agricultural lands which are embraced within the ranch, have you? A. Yes.

Q. Do those lands have any particular climatic advantage compared to other lands, lands in Southern California?

A. The coastal lands very definitely have.

Q. What is the particular advantage?

A. The temperate climate, frost free.

Q. Are there very many frost free areas in this part of—that part of California?

A. No, sir.

Q. How many pickings a year do you get out of lemons? A. From seven to eight.

Q. How does that compare with lemons raised on land which is not frost free?

A. Well, that is—I think, as I say—now, this is just my opinion as possibly a non-expert but I think that is about two more pickings a year than the average grove on account of the frost free condition. The blooms are never taken from the trees.

The Court: Do you mean to tell me there is a place in [583] California where there is a frost free belt and you have that place?

The Witness: (No answer.)

Q. (By Mr. Shryock): At the time that you were—withdraw that.

While you were still identified with the ranch

(Testimony of Henry W. Witman.)

in your capacity as general manager, Mr. Witman, were you familiar with your tenants?

A. Yes, sir.

Q. Did you ever have the State of California as a tenant in your time?

A. No, I don't believe so.

Q. Are you familiar with the property now operated by the state in the ranch property?

A. (No answer.)

Q. If not say so. If you don't know say so.

A. I do not know, no, sir.

Q. Mr. Witman, will you describe the relative location of the South Coast Mesa and Stuart Mesa with particular reference to United States Highway 101 and the ocean and the ranch?

A. Well, the South Coast Mesa, of course, is the south edge of the ranch on Santa Margarita River, which is now entirely Camp Pendleton and it embraces a strip of the coastal mesa which is on both sides of the state highway until you [584] reach the Santa Margarita River.

Q. And on the oceanward side does it go all the way down to the ocean?

A. To the bluff, yes, sir. It drops to the beach.

Q. Then north of the river?

A. North of the river it is exactly the same. It extends inland a little farther. It is a larger mesa.

Q. That is the Stuart Mesa?

A. The Stuart Mesa.

Q. And it is on both sides of Highway 101?

A. Both sides of Highway 101. There are about

(Testimony of Henry W. Witman.)

400 acres west of the highway and approximately 100 acres east.

Q. Does that Mesa go up as far as Cocklebur Canyon? A. Yes, sir.

Q. Is that generally thought of as the northern limits of it? A. That is right.

Q. One further question. So far as you know, Mr. Witman, has there been any interruption in the irrigation of the mesa since it was begun in 1938 or 1939? A. No, sir.

Q. And is the underground basin where those wells were drilled the only source of water for that irrigation system? A. Yes, sir. [585]

Mr. Shryock: Cross examine.

Cross Examination

Q. (By Mr. Dennis): Mr. Witman, when you testified that was the only source of water for that mesa, you meant to say that that was the sole supply of water for that mesa at the present time and that has been derived from those wells?

A. Yes, sir.

Q. But there might be other sources of water?

A. That is right.

Q. Approximately how many boxes of lemons do you get per acre from the lemon grove?

A. Between seven and eight hundred.

Q. Have you ever run short of water from the wells drilled in the Ysidora Basin?

A. No, sir.

Q. There has always been plenty of water?

(Testimony of Henry W. Witman.)

A. Yes, sir.

Mr. Dennis: I think that is all.

The Court: That is all.

Mr. Shryock: Thank you very much.

The Court: Call your next witness.

Mr. Shryock: Mr. Taylor. [586]

WILLIAM D. TAYLOR

called as a witness by the plaintiff, being first sworn, was examined and testified as follows:

The Clerk: State your full name.

The Witness: William D. Taylor.

Direct Examination

Q. (By Mr. Shryock): What is your residence address, Mr. Taylor?

A. 1650 San Luis Rey Avenue, Vista, California.

Q. And what is your occupation?

A. I am a ranch manager of Camp Pendleton.

Q. Are you a college graduate, Mr. Taylor?

A. I am.

Q. From what institution?

A. University of Idaho.

Q. When? A. 1938.

Q. With what degree?

A. Bachelor of Science degree in forestry and range management.

Q. And will you state very briefly what your employment was following your graduation from college?

(Testimony of William D. Taylor.)

A. Soon after my graduation I took employment with the Soil Conservation Service of the United States Department of Agriculture. [587]

I operated soil and range survey studies for approximately two years. Then I went to San Diego County as a soil conservation farm planner. [588]

The Court: For the State?

The Witness: For the Federal Government.

The Court: For the Federal Government.

The Witness: Where I was for approximately eight years, until 1948, when I went to Camp Pendleton.

Q. (By Mr. Shryock): Have you been continuously employed at Camp Pendleton since 1948?

A. That is right.

Q. What are your duties——

The Court: Are you on loan, too, or did you go over——

The Witness: No, sir, I am civil service with the Marine Corps.

The Court: Oh, you are with the Marine Corps?

The Witness: That is right.

Q. (By Mr. Shryock): Mr. Taylor, what are your duties there as ranch manager?

A. Well, my duties are partly administrative and partly technical, and my primary responsibility is the conservation of natural resources of the land, the property, all of the natural resources.

Q. And that would include lands which are not necessarily agricultural or cultivatable?

A. That is correct.

(Testimony of William D. Taylor.)

Q. Is one of your particular responsibilities the non-military land, that is, land not presently being used for [589] military purposes?

A. That's right.

Q. What is done with that land?

A. To the greatest extent possible, any land that is not immediately needed for military purposes is put into some peacetime use, in order that it won't be wasted.

Q. Do you have any idea how much acreage now is leased for agricultural use?

A. For farming?

Q. Yes. A. Approximately 5500.

Q. Do you recall what that approximate figure was when you came to the ranch or to the camp in 1948? A. Approximately 6,000.

Q. Now, that is for agricultural use, that we generally think of as cultivation of the land itself, is it not? A. Yes, sir.

Q. Is there also any additional agricultural use, such as grazing?

A. We graze every possible acre we can get livestock on without interfering with military activity.

Q. What livestock are you grazing on the camp right now?

A. Primarily sheep, but we have quite a few cattle also. [590]

Q. Do you have any idea how many head of cattle?

A. Do you mean within a year, Commander?

(Testimony of William D. Taylor.)

Q. Yes.

A. We had between 15,000 and 20,000 animal units of sheep last winter, and in the neighborhood of 1,000 animal units in cattle.

Mr. Dennis: May I have the figure on the sheep again?

The Witness: Between 15,000 and 20,000.

Q. (By Mr. Shryock): Now, I believe you stated that among your duties was the conservation of the soil and general features of the land itself within the camp areas?

A. That is correct.

Q. What steps, if any, are taken to improve the conditions of those lands? Are there any plans?

A. We encourage farmers to the best of our ability, and I do make a certain—or do a certain amount of planning, that is, technical assistance with those farmers, very much the same as I was accustomed to doing previously with the Soil Conservation Service.

Q. Now, as to lands which are not leased to farmers, is there any program which you have instituted or with which you are connected so far as the land is concerned?

A. Well, we have worked considerably on the Santa Margarita River bottom in water-conservation measures.

Q. What have been the steps taken in that regard? [591]

A. Well, we have made some attempt to devise spreader basins in the bottom to recover all water that would normally be wasted into the ocean.

(Testimony of William D. Taylor.)

Q. Would you describe how they operate?

A. They are simply small sand dikes which hold back the high water during the winter and spring months, and raise the pressure, in order that it will penetrate somewhat more into the ground rather than running right off.

Q. And will also spread; is that it?

A. That is right. It spreads over a much larger area.

Q. Does removal of phreatophytes come within that program? A. Yes, it does.

Q. Has that been done?

A. We have removed in the neighborhood of 200 acres of phreatophytes.

Q. What specific—what phreatophyte?

A. Salt cedar, so-called tules, willows, and a plant commonly known as water moldy. *Baccharis* is the scientific name. It has any number of common names.

Q. Will you spell that?

A. B-a-c-c-h-a-r-i-s.

Q. Do these plants you remove have any economic value? A. None, to my knowledge.

Q. Do they have any common characteristic?

A. They are all water lovers.

Q. And water users?

A. Water users, high water users.

The Court: Do they grow at places where they might prevent erosion? Do they have some value as such?

The Witness: Not a great deal, sir. They have

(Testimony of William D. Taylor.)

a tendency to clog up a channel so that the water which would normally follow the natural channel has to go elsewhere, and actually they have a tendency to increase erosion on the channel rather than otherwise.

The Court: Something like roots getting into a clap pipe and stopping it up?

The Witness: That is correct, yes, sir.

Q. (By Mr. Shryock): Now, Mr. Taylor, are you familiar with the irrigation of the areas known as Stuart Mesa and South Coast Mesa?

A. I am.

Q. Are they under lease at the present time?

A. They are.

Q. Do you have any idea what acreage of Stuart Mesa is irrigated?

A. Over a period of a year, somewhere in the neighborhood of 1,000 acres. On Stuart Mesa, did you say, Commander?

Q. Yes. A. Yes. [593]

Q. How much of that is outside of the watershed, if you know?

A. I know only from perusal of maps that have been made. I believe it is impossible to tell by the ocular system of going out and looking. I have studied a map. The acreage outside of the watershed, of that 1,000, is approximately 800.

Q. Where does the water come from?

A. The water comes from the underground basins in Ysidora.

Q. And is pumped? A. It is pumped.

(Testimony of William D. Taylor.)

Q. Is water obtained from any other source for the irrigation system?

A. Not to my knowledge.

Q. Now, I believe you said that there were about 1,500 acres of Camp Pendleton leased out for farming purposes; is that correct?

A. That is correct.

Q. Is that the maximum or anywhere near the maximum amount suitable for such cultivation that you could lease?

A. No, sir, it is nowhere near the maximum amount. [594]

Q. Now, why have you not leased more than 5,500 acres?

A. Primarily, basically for two reasons. There isn't enough water for one and a good deal of the land is used by the military and it is not available.

Q. Well, is there land available and suitable for cultivation which is not leased?

A. Yes, there is.

Q. Why isn't it leased?

A. Because there is not enough water.

Q. Now, Mr. Taylor, I gather from your testimony that you do not have a great deal to do with the military aspect of the camp, is that correct?

The Court: That is an understatement.

The Witness: Not exactly. It would be rather difficult to be located right in the center of the

(Testimony of William D. Taylor.)

camp without having much to do with the military. I am constantly associated with them.

Q. (By Mr. Shryock): Will you state the terms on which you lease camp property to farmers and cultivators with respect to the military nature of the camp?

A. There are clauses in all of the leases providing for revocation at will. Further, all of the tenants, regardless of where they are situated on the camp, understand that the military may trespass on their land while they are under lease and of course the military is very anxious to be, you [595] might say, gentlemen about that. They give the best notice that they can in cases where it is necessary to trespass. But the farmers are—all the farmers—they all know that that could happen.

The Court: They are an understanding lot.

The Witness: That is right.

Q. (By Mr. Shryock): What degree of co-ordination is there, let us say, with respect to these thousands of head of sheep and cattle where they might interfere with military maneuvers?

A. Well, it is one of my jobs to see that that never happens.

Q. Well, suppose that you had sheep grazing in a certain area and you were advised by your military colleagues that there was going to be a maneuver there, what would you do about it?

A. I see the sheep herder at the earliest possible moment or at the right moment and make sure that the sheep are either off of the reservation or

(Testimony of William D. Taylor.)

in some other part of the reservation.

Q. That is one of your duties?

A. That is right.

The Court: Do you have corrals there or what do they call those places?

The Witness: They have temporary corrals.

Q. (By Mr. Shryock): Can you tell us anything about the potential increase of grazable vegetation in the camp? A. (No answer.)

Q. In other words, with respect to grazing plans and erosion control and so forth?

A. (No answer.)

Q. Is there grazing land which with sufficient water and proper control could be added to the acreage now available?

A. Oh, a great deal of land, yes, sir.

Q. How much would you say?

A. I would guess or estimate that in the river valley itself, which is ideally suited to grazing, there is at least 3,000 acres of land.

Q. 3,000 acres which what?

A. Which could be developed into excellent pasture.

Q. Is there anything which prevents that from being done?

A. Lack of water primarily.

The Court: What is the ownership of these animals?

The Witness: They are tenants, your Honor. They are not lessees. They are permittees. They have permits.

(Testimony of William D. Taylor.)

The Court: And you charge them for grazing on the land?

The Witness: Yes, sir.

The Court: I didn't know whether the Government was in the sheep business in competition with private enterprise or [597] not. Somebody might resent that.

The Witness: That is right.

Q. (By Mr. Shryock): Now, Mr. Taylor, who is given or who reserves the right to revoke the leases that you mentioned?

A. The commanding general.

Q. Is there any provision in your leases as to the cut-off of water in the event of a diminution of supply or failure of supply?

A. All of the leases have a clause stating that the Government will not furnish them any water—will not furnish water to anybody and if they get water they get it by their own efforts.

All of the leases—pardon me, except one. That one lease in which the irrigation system itself of Stuart Mesa is leased.

Q. And does that lessee in turn redistribute the water to other farmers?

A. That is correct. He leases the system and redistributes the water.

Q. Have you ever been obliged to cut off water because of failure of supply? A. Yes, sir.

Q. Mr. Taylor, do you recall the winter of 1951-52? A. Yes, I do.

Q. In the camp? [598] A. Yes, I do.

(Testimony of William D. Taylor.)

Q. By what climatic feature was that characterized?

A. We had some high water in the river.

Q. What about rain?

A. The rainfall was somewhere in the neighborhood of double the normal rainfall.

Q. What was the effect of that kind of weather on the valley of the Santa Margarita?

A. Well, do you mean the channel, commander, or the valley?

Q. The whole valley.

A. Well, the vegetation, the desirable vegetation increased a great deal. And I believe I could go a step further and say much of the undesirable vegetation decreased.

Q. Does that occasion any thought in your mind of a distinction between annuals and perennials?

A. Well, that was primarily what I had in mind.

Q. Could you explain that for us briefly?

A. When there is sufficient moisture the perennials will actually do quite well in that valley without irrigation. When the water table drops and we have a series of dry years the foxtails and other undesirable vegetation, which can make its growth all in a very short time, will come in and crowd out the perennials which don't do so well in those seasons.

Q. Do you know who all your tenants are, Mr. Taylor? [599]

A. Yes, I do.

Q. Is the State of California one of them?

A. Yes.

(Testimony of William D. Taylor.)

Q. What is the nature of its tenancy?

A. The State of California leases in the neighborhood of 250 acres of irrigable land on the South Mesa for the purpose of raising potatoes in the winter time.

It is a potato seed certification program in which seed potatoes from all over the country, every potato growing state in the country and two or three provinces in Canada and Alaska are tested during the winter months for virus diseases.

The Court: Is that an experimental station?

The Witness: That is right, sir.

Q. (By Mr. Shryock): Can you identify any particular reason why an experimental station of that nature should be located on a property like Camp Pendleton?

A. Purely because of the temperate climate.

Q. And what is the distinguishing feature of that?

A. Well, it is warm enough there so that potatoes will grow during mid-winter and they gain a year in their testing. Last summer's seed crop can be tested during the winter so that they will have the results for the following summer. They don't lose a year in their potato growth—in their seed growth.

The Court: How long has that project been there? [600]

The Witness: Just about five years.

The Court: Since the Government occupancy?

The Witness: That is right.

(Testimony of William D. Taylor.)

Q. (By Mr. Shryock): Are they inside or outside of the watershed, Mr. Taylor?

A. Partly in and partly out.

Q. Do they use Camp Pendleton water?

A. Yes, they do.

Q. Where does it come from?

A. The same Ysidora basin.

Q. How frequently is frost experienced on land such as the experimental station is on?

A. Not at all to my knowledge.

Q. Is that one of the advantages of that land?

A. It certainly is. It is very essential in the case of potatoes.

Q. Mr. Taylor, in co-operating with your tenants do you make any attempts to conserve water or the use of water?

A. I am making constant attempts to conserve water.

Q. Are tenants permitted to have as much water as they consider they need for irrigating the land which you have leased to them?

A. They are not.

Q. How do you handle that

A. We allocate water on the basis of total acreage [601] leased to the individual tenant. Would you like me to give the proportion that we allocate, Commander?

Q. Briefly.

A. We have a sort of a sliding scale. A man leasing 100 acres is allowed to use 100 acre-feet of water in a year. A man leasing more than 100

(Testimony of William D. Taylor.)

acres he gets one acre-foot per acre for the first hundred and 75 hundredths of a foot per acre—an acre-foot per year for the next hundred acres under lease and a half an acre foot per acre for the third 100. [602]

The Court: What do you do, apply the law of diminishing returns?

The Witness: We try to protect the small tenants, your Honor.

The Court: I see.

The Witness: We have no tenant over 300 acres, so that is the limit of our allocation.

Q. (By Mr. Shryock): Does he get as much water as he wants? A. No, sir.

Q. Do you make any limitations on how much acreage they may use that water upon, once they have their amount determined?

A. None whatsoever. That was the system that was there when I came, and it wasn't conserving water quite as well as I thought it should, and we changed to this other system.

Q. And with what result?

A. I believe the use of irrigation water on Stuart and South Coast Mesas is about as efficient as I have ever witnessed.

The Court: You said you do not encourage large farming. What is the largest unit you have?

The Witness: Well, of the truck farmers, we have one that runs about 320 acres, but it isn't in the Santa [603] Margarita watershed.

(Testimony of William D. Taylor.)

The Court: I see.

The Witness: That is, it does not derive water from the watershed.

The Court: I see.

The Witness: We have larger dry-farming areas leased.

Q. (By Mr. Shryock): Mr. Taylor, does the area known as South Coast Mesa receive irrigation water? A. Yes, it does.

Q. Was it doing so when you arrived at the camp? A. Yes, sir.

Q. Has that been continuous since?

A. Yes, sir.

Q. Do you have any idea how many acres of South Coast Mesa lie outside the watershed?

A. About 450.

Mr. Shryock: Cross-examine.

Cross Examination

Q. (By Mr. Dennis): Mr. Taylor, what is the average rainfall in this area?

A. Well, that varies rather markedly in rather short distances. Do you mean——

Q. In the Santa Margarita watershed.

A. In the Santa Margarita watershed on Camp Pendleton, [604] approximately twelve.

Q. What is it above Camp Pendleton in the Santa Margarita watershed?

A. I don't know.

Q. How much rainfall did you receive for the water-year October 1, 1941—starting October 1, 1951?

(Testimony of William D. Taylor.)

A. I couldn't tell you exactly, but it runs in my memory that it was in the neighborhood of 22.

Mr. Shryock: May I respectfully suggest that we are having a little bit of difficulty in hearing you, Mr. Dennis.

Mr. Dennis: The reporter had said she had difficulty in hearing me before. I will move back here. I wonder if we can move this map back, so that I may get back here.

The Court: If you want to sit nearer the witness, why don't you sit on the opposite side of Commander Shryock? With certain witnesses, you know, sometimes you have to go to the end of the courtroom and have the witness talk to you so that the witness can be heard. Witnesses arrange their voices, and I think they do it unconsciously, so that they direct their voices to the person they are talking to and do not realize a lot of other people in the courtroom have to hear everything that is going on.

Q. (By Mr. Dennis): Now, Mr. Taylor, when you said you had approximately 5,500 acres of land under lease at the present time, is all of that land located within the watershed [605] of the Santa Margarita River? A. No, sir.

Q. Is there a part of it located in the San Mateo watershed? A. Yes, there is.

Q. How many acres in the San Mateo watershed?

A. In the neighborhood of eight to nine hundred.

(Testimony of William D. Taylor.)

Q. And is part in the watershed of the San Onofre? A. Yes, it is.

Q. Approximately how many acres?

A. Well, that is difficult to say, because that is all under one lease, but not all in the watershed. I can only estimate. Probably in the neighborhood of 400 acres, three to four hundred.

Q. And have you acreage in the watershed of Las Flores Canyon?

A. Yes, we have.

Q. Approximately how many acres in Las Flores Canyon?

A. Somewhere in the neighborhood of 300.

Q. That acreage is not supplied with water from the Santa Margarita River? A. No, sir.

Q. Now, is some of the acreage you have under lease dry-farmed? A. Yes, it is. [606]

Q. Are you familiar with what is known as Chappo or Middle Basin?

A. Approximately.

Q. Have you any acreage that is under lease for agricultural purposes that overlies Chappo basin? A. No, we haven't.

Q. Are you familiar with O'Neill basin?

A. May I restate that? Not under lease. We graze Chappo under permit.

Q. Now, how many acres are under permit at Chappo? You say "graze"? A. Graze.

Q. Oh, graze. I beg your pardon.

A. Yes.

(Testimony of William D. Taylor.)

Q. Is any portion of O'Neill basin or Upper basin leased for agricultural purposes?

A. No, sir.

Q. Is there any land that is above, upstream from O'Neill or Upper basin, that is leased for agricultural purposes? A. No, sir.

Q. Now, your grazing leases or permits apply to large acreages? A. That is right.

Q. Are there any permits which limit the grazing [607] privileges to the watershed of the Santa Margarita River? A. No, there are not.

Q. The sheep, 15,000 or 20,000 head of sheep, which you referred to, would be grazed on the entire range of the 123,000 acres?

A. That is correct.

Q. Would the same apply to the cattle?

A. It is a little different with cattle, because they have to be fenced, and we have to say exactly where they are going in order to implement the fencing.

Q. Are they confined to premises on the United States Naval Ammunition Depot?

A. No, we have cattle on Camp Pendleton also.

Q. Does the 1,000 head apply to cattle on both the United States Naval Ammunition Depot and Camp Pendleton?

A. No, sir. That is exclusive to Camp Pendleton.

Q. Exclusive of the Naval Ammunition Depot?

A. No, sir, to Camp Pendleton. My 1,000 head that I mentioned is exclusive to Camp Pendleton.

(Testimony of William D. Taylor.)

I have nothing to do with the Naval Ammunition Depot.

Q. You have nothing to do with the Naval Ammunition Depot? A. That is right.

Q. So that the 1,000 head would be cattle that grazed on Camp Pendleton? [608]

A. That is correct.

Q. And are those cattle——

The Court: These cattle belong also to private individuals?

The Witness: That is correct, sir.

The Court: And you make leases with them and allow them to graze there?

The Witness: That is right.

Q. (By Mr. Dennis): Those cattle are only run on the reservation during the wet season of the year? In other words, that the permittee is required to remove them along in May, or April, or June?

A. No, sir, they are not required to remove them. We have some livestock that remain the year around. They cut way down in the dry months.

Q. Approximately how many head of livestock do you run during the dry season?

A. We have somewhere in the neighborhood of 1,500 sheep units which have grazed for the past two dry seasons, but not prior to that; and, oh, from three to four hundred cattle.

Q. So that the figure of 15,000 or 20,000 sheep and the larger figure for the cattle is the number which you graze during the wet season?

(Testimony of William D. Taylor.)

A. At any one time, but not the year around.

Q. Now, is there any portion of the surface area of Ysidora basin under lease for agricultural purposes?

A. No, sir.

Q. When did you say you arrived at the military reservation? A. November 15, 1948.

Q. And you have been there ever since?

A. That is right, sir.

Q. Now, when was water first cut off because there was a failure of supply?

A. It was never cut off. It was restricted.

Q. It was restricted. When was that?

A. In the spring of 1949, the first that I had anything to do with, and I can't testify as to previous regulation.

Q. Now, was there any occasion other than the spring of 1949 when water was cut off?

A. It has been cut off or restricted continuously since then.

Q. Now, that is restricted to the amount that you specified in your lease, of one acre-foot up to 100 acres, and so forth? A. Yes, sir.

Q. There has been no time since you have been on the reservation when the tenants have not been able to secure the [610] amount of water to which they were entitled under their lease?

A. Would you repeat that, please?

Q. I say, at no time since you have been employed as ranch manager have the tenants been restricted to less water than that to which they are

(Testimony of William D. Taylor.)

entitled under and pursuant to the terms of their lease?

A. That is correct, because the terms of their lease don't promise them any water.

Q. In other words, when they make their lease for farming purposes, they haven't the right to demand any water at any time?

A. That is correct.

Q. Now, do you make a charge, then, for the water which you furnish them, in addition to the rental which they pay under the lease?

A. A charge is made.

Q. Is the tenant at the time that they lease the property given the understanding that they will have the right to receive one acre-foot per acre up to 100 acres of land that is in the lease?

A. That is right.

Q. They are given to understand that they will have the right? A. That is correct. [611]

Q. And at no time since you have been camp manager have you denied any tenant the right to that amount of water?

The Court: Except in restricted periods.

Mr. Dennis: That is what I mean.

Q. Up to that amount?

A. That is right.

Mr. Dennis: I think that is all.

Mr. Shryock: Mr. Grover?

Mr. Grover: No questions.

The Court: Have you any redirect?

Mr. Shryock: No, sir. Thank you very much.

(Testimony of William D. Taylor.)

The Court: All right, Mr. Taylor.

(Witness excused.)

The Court: Is your next witness a long witness or a short one? I am just asking the question because I wanted to know whether to have a recess now or later.

Mr. Shryock: A short one, sir.

The Court: All right. Then we can go on.

Mr. Shryock: Mr. McNearny, please.

JOSEPH R. McNEARNY

called as a witness on behalf of the plaintiff, being first duly sworn, was examined and testified as follows:

Direct Examination

The Clerk: What is your name, please?

The Witness: Joseph R. McNearney, M-c-N-e-a-r-n-y. [612]

Mr. Dennis: I couldn't get your name.

The Witness: McNearney, M-c-N-e-a-r-n-y.

Q. (By Mr. Shryock): What is your residence, Mr. McNearny?

A. 1916 South Freeman Street, Oceanside.

Q. California? A. California.

Q. What is your occupation?

A. Civilian in charge of pipe and plumbing at Camp Pendleton.

Q. When did you first become connected with Camp Pendleton? A. October, 1942.

Q. Was that about at the time of the acquisition of that property by the United States?

(Testimony of Joseph R. McNearny.)

A. Shortly after.

Q. In what capacity did you become connected with the camp?

A. Officer in charge of pipe and plumbing. At that time I was in the Marine Corps.

Q. In military service? A. Yes, sir.

Q. On active duty? A. On active duty.

Q. When did you return to inactive duty? [613]

A. In 1946.

Q. Since October of 1942 have you been continuously employed at Camp Pendleton?

A. With the exception of a short trip I made to Saipan, I was there continuously.

Q. How many months was that?

A. Nine months.

Q. During the nine years from 1942, with what part of the camp's operation have you been principally connected?

A. The maintenance and operation of the pumps and the water system at Camp Pendleton.

Q. The water-distribution system?

A. Yes, sir.

Q. Mr. McNearny, I show you Plaintiff's Exhibit 22, with particular reference to the Ocean-side sheets and the Fallbrook sheets, and I ask you whether or not the essential features of the water-distribution system are depicted on that exhibit.

A. Yes. The pumps are in here (indicating), and the water system is here, and your reservoirs are up in here (indicating.) [614]

Q. And by that you are pointing to certain

(Testimony of Joseph R. McNearny.)

lines and I might call your attention to the fact that this map does bear a basic legend, does it not?

A. Yes, sir.

Q. Pipeline?

A. Pipeline, irrigation system and watershed boundaries.

Q. Sewage lines?

A. Sewage lines. Everything is noted.

Q. Every essential — water and sewage. Now, does that reflect—I will withdraw that.

A. This is all the same as when I first came there.

Q. That was the question I wanted to ask you, whether or not after the camp got into operation the distribution system was substantially as it is represented today? A. Yes, sir, it still is.

Q. And has that distribution system with the exception of changes or substitutions in things like pipe—— A. Yes.

Q. Remained substantially the same throughout the operation of the camp?

A. It has remained the same.

The Court: How did you happen to be assigned to this duty? Did you specialize in that type of work?

The Witness: Yes.

The Court: In civilian life? [615]

The Witness: Yes, sir; my work has been construction all my life.

The Court: All right.

Q. (By Mr. Shryock): Now, have you noted on

(Testimony of Joseph R. McNearny.)

Exhibit 22, Mr. McNearny, the outlines of the watershed of the Santa Margarita River?

A. Yes, I did notice it.

Q. Is any of the water in the camp system carried outside of the watershed by the distribution system?

A. Yes, practically all of it. 11, 12, 13, 14, 15, 16 areas are all outside the watershed.

Q. And are those areas designated on the exhibit by the digits you have just recited?

A. Yes, sir.

Q. Well, is that true then, essentially, throughout the nine years that the camp has been in operation?

A. It is exactly the same as it was when I came here.

Q. Where does the water in that distribution system come from?

A. It comes from the deep wells in the Santa Margarita.

Q. Pumped from the underground basin?

A. Yes, sir.

Q. What can you say about the supply of Camp Del Mar?

A. What does the Commander mean, "Supply of Camp Del Mar"? [616]

Q. Is Camp Del Mar supplied by the camp water distribution system?

A. Oh, yes, sir, that is pumped from Ysidora.

Q. And is that shown on the Oceanside sheet?

A. Yes, sir, it is shown on this sheet here.

(Testimony of Joseph R. McNearny.)

Q. On the Oceanside sheet?

A. Yes, that is correct.

Q. Now indicate where on the map Camp Del Mar is located?

A. This vicinity in through here.

Q. And by that you are indicating an area immediately adjacent to the ocean and inside what are shown to be the boundaries of the watershed?

A. Part of it is inside and part of it is outside.

Q. In other words, all of the area that I am indicating here in block No. 6374?

A. Would be outside.

Q. Outside the watershed?

A. That is correct.

Q. And is that on the distribution system which obtains its water from the Ysidora Basin?

A. That is correct.

Q. Pumps? A. Yes.

Q. Mr. McNearny, has the use of water through that distribution from the time it was put in operation continued [617] without interruption?

A. Yes, sir.

Q. Are you familiar with Lake O'Neill on the camp property?

A. Well, if you mean familiar with it — we operate it.

Q. Then you must be familiar with it?

A. Yes, sir.

Q. Do you recall any occasions in the past four

(Testimony of Joseph R. McNearny.)

years, let us say, in which Lake O'Neill has been dumped?

A. Yes, sir, twice at least in the four years.

Q. It has been dumped twice in four years?

A. Yes.

The Court: Do you mean emptied?

The Witness: Emptied.

Q. (By Mr. Shryock): And what was the purpose of that operation?

A. To replenish the basin.

Q. And in what way does emptying the lake accomplish that?

A. It flows right from the channel right down into the vicinity of where our pumps are located in the Santa Margarita Basin.

Q. And would the water therefore be released in what is known as the O'Neill or upper basin when it comes out of the lake? [618]

A. Well, it comes directly out of—well, as they now call the lake O'Neill, right on into the Santa Margarita River.

Q. But that is right in the vicinity of the lake?

A. That is the lake.

Q. Have you any control apparatus for the operation of emptying the lake?

A. Yes, sir. We have a valve at the low point of the lake and culverts running from that valve out to the channel to put it directly into the Santa Margarita River.

Q. So that you can control the release of water?

A. We can put out an inch of water, four feet of

(Testimony of Joseph R. McNearny.)

water. The valve is, as I remember—it has been a long time since I got a look at it, but it is about 24 inches, 24 to 36 inches and up to three feet we can control any amount of water going out of that culvert.

Q. And the manner of controlling water in Lake O'Neill is a part of the department you are connected with, is it? A. Yes, sir.

Q. What is that department, exactly, Mr. McNearny? A. Water and sewage.

Q. And is that under the Camp Public Works office?

A. That is the post maintenance office. That is the Marine section.

Q. Mr. McNearny, are you familiar with the so-called [619] O'Neill ditch?

A. Yes, sir, the one running adjacent to the Margarita and the lake, yes, sir.

Q. Can you state whether any water diverted from the Santa Margarita River into the O'Neill ditch must necessarily go into Lake O'Neill?

A. That is not true. It can continue on directly down into the Santa Margarita by by-passing the Lake O'Neill. To get it into Lake O'Neill through that ditch you would have to put a series of baffles and then open a valve to get it into Lake O'Neill.

Q. And if those artificial means were not used it would continue on past the lake and over into the basin?

A. That is correct.

Mr. Shryock: Cross examine.

(Testimony of Joseph R. McNearny.)

Cross Examination

Q. (By Mr. Dennis): Now, I think you testified on two occasions during the last four years you had emptied Lake O'Neill by releasing water through a valve, is that correct?

A. That is correct, yes, sir.

Q. Could you give us the dates on which you emptied Lake O'Neill?

A. Well, to give you the dates no, but I could check my records in the office. But in 1950 and 1949 I know of those [620] two years—not dates.

Q. Now, do you remember the month, approximately? Was it in the winter?

A. It was just before the winter hit, before the rains hit.

Q. In other words you emptied the lake just before you anticipated there would be a substantial increase in the flow of the Santa Margarita River?

A. We opened them to help the basin and at that the same time knowing that we were picking up the surplus that was coming down the canyon into the lake.

Q. You say to help the basin. Do you recall what your lift was in these various wells at that time?

A. No, sir.

Q. Do you know what the levels were, static water levels in the wells?

A. My records show them, I believe. I believe they are on exhibit here but I wouldn't be able to give you the figures, no.

Q. Did you maintain records of the static water

(Testimony of Joseph R. McNearny.)

water. The valve is, as I remember—it has been a long time since I got a look at it, but it is about 24 inches, 24 to 36 inches and up to three feet we can control any amount of water going out of that culvert.

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A. We opened them to help the basin and at that the same time knowing that we were picking up the surplus that was coming down the canyon into the lake.

Q. You say to help the basin. Do you recall what your lift was in these various wells at that time?

A. No, sir.

Q. Do you know what the levels were, static water levels in the wells?

A. My records show them, I believe. I believe they are on exhibit here but I wouldn't be able to give you the figures, no.

Q. Did you maintain records of the static water

(Testimony of Joseph R. McNearny.)

table and the drawdown water tables in the various wells during the year 1949 and 1950?

A. From 1947, February 1947.

Q. What wells did you maintain records on?

A. C.B-1, 11-F, 11-X, 11-D. [621]

Q. Not quite so fast.

A. CB-1, 11-F, 11-X, 11-D.

Q. That is in the Upper Basin? A. Yes.

Q. You maintained readings in any of the other wells? A. Yes, in the Ysidora.

Q. Chappo?

A. When you say Chappo you have Chappo there.

Q. This is the upper——

A. We have been referring to that——

Q. When we referred to Chappo we meant that as Middle and O'Neill is the Upper.

A. Well, there aren't any pumps in the alleged Upper Basin.

Q. How often did you take those readings?

A. We have them at least every month throughout the year.

Q. And where are those records maintained? In the post maintenance office?

A. In the post maintenance office, yes.

Q. And would you also have the records in the post maintenance office as to the time when you released the water from Lake O'Neill.

A. Yes, sir; and also the record of how long it took and how many inches each day that came back into the lake. [622]

(Testimony of Joseph R. McNearny.)

Q. Now, did you ever run short of water at Camp Pendleton?

Q. What do you mean by "run short"?

Q. Were there any times where you had to curtail the use of water because you couldn't produce enough from your wells? A. Yes, sir.

Q. When you couldn't produce enough water from your wells to supply the camp?

A. Well, when you say "produce enough water from the wells"—I went there in 1942 and some of our wells were producing 1400 gallons a minute and at the last checks those that were producing 1400 gallons a minute dropped to 800 gallons a minute.

Now, that can be due to sand. It can be due to the cutting of the bowls and it also can be due to the insufficient amount of water.

Q. Did you make any investigation to determine what the reduction in gallonage was due to?

A. Yes. We pulled several of the pumps and we found in several instances the static table dropped. And in another place we found that we were pumping sand, so there isn't any way of putting your finger on it and saying this is the case.

The Court: Unless you pull the pipe in most of them.

The Witness: That is correct, sir. [623]

Q. (By Mr. Dennis): You can measure the static water table, can you not, without pulling the pump?

A. Oh, yes, surely. You have an air line going down there that will indicate where it is.

(Testimony of Joseph R. McNearny.)

Q. And it is considerably easier to drop a tape down?

A. Yes, sir.

Q. Now, you had no supervision over the water distribution in the Naval Ammunition Depot?

A. No, sir.

Q. That is out of your jurisdiction?

A. Yes, sir.

Q. Now, I think you stated that you had noted the limits of the watershed of the Santa Margarita River on this map. By that you didn't mean that you had placed the lines which designated the boundary?

A. No, sir, only I noted it there.

Q. By observation is what you meant?

A. Yes, that is right.

Q. In other words, you didn't place any lines on this map yourself? A. Nothing whatsoever.

Mr. Dennis: I think that is all.

The Court: All right.

Mr. Grover: No questions.

Mr. Shryock: Thank you very much, Mr. McNearny. [624]

Mr. Dennis: Could we have a short recess, your Honor?

The Court: Yes, we will take a short recess.

(Short recess.) [625]

The Court: You may proceed.

Mr. Shryock: Colonel Robertson, please.

ELIOTT B. ROBERTSON

called as a witness on behalf of the plaintiff, being first duly sworn, was examined and testified as follows:

Direct Examination

The Clerk: What is your name, please?

The Witness: Elliott B. Robertson. First name spelled E-l-i-o-t-t.

Q. (By Mr. Shryock): And what is your rank, Colonel?

A. Lieutenant colonel, United States Marine Corps.

Q. What is your residence, Colonel?

A. Waldorf, Maryland.

Q. Is that near Washington?

A. About 20 miles out.

Q. Will you describe briefly your educational background, Colonel, beginning with your graduation from high school, and the year?

A. I graduated from high school in Bethesda, Maryland, in 1934. For approximately a year and a half I worked in various construction trades, as I had all my life.

I entered the University of Maryland in the fall of 1935 and graduated with a Bachelor of Science degree in civil engineering in 1939. [626]

Q. Now, following that, what did you do?

A. For a very short period, a matter of weeks, I was on active duty as a second lieutenant in the United States Army, following which I became a

(Testimony of Elliott B. Robertson.)

regular officer in the United States Marine Corps. I went to Philadelphia for approximately ten months of basic training, leaving there in the summer of 1940, and proceeded to Hawaii, at which point I became attached to a ship in the fleet and cruised the Pacific Ocean for about 13 months.

In about July of 1941 I proceeded to San Diego, and was attached to an infantry unit at San Diego and entered Camp Elliott at various times.

In October of that year I was attached to an engineer unit, an engineer battallion, and proceeded to Pearl Harbor as a company commander of engineers. At that place we spent seven or eight months building Camp Catlin — C-a-t-l-i-n — and my job there——

The Court: Colonel, the previous witnesses, because we are roaming all over the United States, have formed the custom of spelling out names, so if you will help us along that line, it is very helpful to the reporters.

The Witness: Yes, sir. I had approximately one-third of the camp assigned to me for construction under my personal direction, and we built some 250 buildings of all types, mess hall, barracks, bakery, and so on. [627]

Q. (By Mr. Shryock): Since 1939, Colonel, have you been on continuous active duty as a regular Marine Corps officer? A. I have.

Q. Where were you on the day of 7 December 1941?

A. Well, there is one little gap yet. I am sorry.

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There is not. I was at Pearl Harbor in the Navy Yard.

Q. Following that, what was the character of your duty during the war years, the combat years?

A. I have just described the first few months, when we were building this camp. Our unit returned to the United States to join the 2nd Marine Division, of which we were a part. I was separated, and ordered to Washington, D.C., where for a short while I was assistant, and then officer in charge of the planning, procurement and supply of combat engineer equipment for the Marine Corps.

Q. How long were you in the Washington assignment? A. 28 months.

Q. Then what followed that?

A. In November of 1944 I proceeded to Guadalcanal, where, in the capacity of battalion commander, I formed the 6th Engineer Battalion, which is part of the 6th Marine Division, which also formed at that place.

We were there for five or six months, training, and building roads and bridges, and providing all of the [628] housekeeping necessities for the division, their water, and so on, following which we went to Okinawa and engaged in combat.

At Okinawa I was the division engineer for the 6th Marine Division, and for a few days of combat I had a naval construction battalion under my direction, plus my own engineer battalion, plus the 6th Pioneer Battalion. After the Seabees were left to construct an air field which I had started, I

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retained the company and the pioneer battalion under my direction.

Q. Was your unit engaged in actual combat?

A. We were.

Q. On Okinawa? A. Yes.

Q. Did those combat activities result in any personal effects on yourself?

A. I was wounded twice at Okinawa. The second wound resulted in about nine months of hospitalization.

Q. Were you sent back to the United States for that hospitalization?

A. I was sent back almost immediately, for my hospitalization at Bethesda, Maryland.

Q. How long were you there? Approximately nine months, you say?

A. About nine months elapsed time, and I entered [629] Bethesda, Maryland, the 6 July 1945 and departed 11 February 1946.

Q. In February, 1946, then, were you discharged from the hospital and returned to active duty?

A. I was.

Q. And what assignment did you take up at that time?

A. I was ordered to headquarters of the Marine Corps again, and assigned to a billet as assistant head of utilities and public works section of the supply department of the headquarters. [630]

The Court: Where was that?

The Witness: Washington, D.C.

Mr. Shryock: Colonel, will you say whether or

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not you received any award as a result of your activities on Okinawa?

A. I got the usual merit badge for each wound and received the Silver Star.

Mr. Shryock: I assume that the court is aware that the Silver Star is one of the highest military decorations there is and is a statutory one.

The Court: That is right.

Q. (By Mr. Shryock): The award of the Silver Star requires a personal commendation by the head of the department involved, does it not, Colonel?

A. It does.

Q. Now, would you describe in some detail the nature of your duties, beginning with a statement as to the particular characterization of office which you hold in the Marine Corps, following your return to active duty? I am referring to the supply designation.

A. Well, for some time after my return to duty I continued to be classified as an engineering officer, but I am not sure whether it was 1946 or 1947 when I became designated for duty as supply duty. The designation was made by the Secretary of the Navy.

That supply duty classification in the Marine Corps is [631] one separate and apart from all the other officers of the Marine Corps and was established under a specific statute.

Q. Now can you state, Colonel, whether or not since 1948 your duties have been in substantially

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the same area of activity but with increasing responsibility as the years have passed, of course.

A. From 1946, February 1946 to February of 1951 I remained in the same specific job as assistant head of the utilities and public works section. At that time, February of 1951, I relieved my superior and became the head of the utilities and public works section which job I now occupy.

Q. Is that your principal billet, your principal assignment?

A. That is my principal assignment and at the same time I assumed that assignment I assumed the traditional collateral duty which accompanies that assignment entitled "Recorder, Marine Corps Station Development Board."

Q. Now, could you tell the court something of the nature of the personnel and function of that board?

A. The Marine Corps Station Development Board is composed of eight of the top generals of the Marine Corps stationed at the headquarters, represented first by the assistant Commandant, a Lieutenant General, then by various other Generals from the various departments, such as the director of aviation, Inspector General, Quartermaster General, the G-1, G-3, G-4 and so on. [632]

The Board duties are to review and keep in constant readiness a current and long-range plan for the development of the posts and stations of the Marine Corps to meet the known requirements. In other words, we determine what the population

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deployment will be—that is what the first Marine Division will be and what it will do and what its strength will be and we inform the station from my office their job.

The station is required at specified times to return a development plan which shows the items which they need to complete their stations, to carry out their assigned tasks.

Q. Now give an example of what you are referring to as a “station.”

A. It is any activity of the Marine Corps such as Camp Pendleton, a Marine Corps recruiting depot, the Marine Corps School at Quantico, the supply office in Georgia, the Marine barracks at Camp Lejeune and so forth.

Q. Now, what are you required to do at and for that board as the recorder?

A. Well, as the recorder I have the simple administrative duty of keeping the records straight, putting the submissions in proper form for the board perusal.

I have been personally and directly charged by the assistant Commandant of the Marine Corps, the present and past one, with the responsibility and duty of looking at [633] each and every station, each and every project; recommending to that board approval, disapproval, modification and its relative merit with regard to other projects which may be submitted by other stations.

Q. And is it your duty to collate and bring

(Testimony of Elliott B. Robertson.)

before the board of eight generals the information upon which they are required to act?

A. That is correct. I briefly describe to them each project, the station's justification for it, my own opinion after examination and my recommendation as to what disposition is made and that is submitted in the form of a priority list—the project considered to be most important at the top and the least important at the bottom.

I do not intend to convey that I personally say yes or no. I am charged with technical advice to the board and from time to time they deem it wise to overrule some of my ideas.

Q. Well, it is at least fair to say, is it not, Colonel, that your personal recommendations carry, let us say, some weight with the board?

A. In that I am the only construction man present.

Q. Now, will you tell the court when in the course of carrying out these duties you first became acquainted with the Marine Corps post known as Camp Pendleton?

A. That dates back to my wartime assignment when in July 1943 it became apparent Camp Pendleton was hampered in [634] activities due to a lack of proper layette—of housekeeping equipment.

I proceeded to Camp Pendleton under orders. I studied the camp and its operation and came to the conclusion that a list of things were needed for the proper operation of the camp, such as shovels—that is to say power shovels, tractors, grass

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cutting equipment, pumps, welders, lighting equipment—practically everything that is required in the maintenance and operation of a Marine Corps post. I then returned to the City of Washington and drew up specifications and purchased the equipment and furnished it. That was my first experience with Pendleton.

Q. And what year was that? A. 1943.

Q. So that your acquaintance with the camp and its operation dates from the very early days of its acquisition by the Navy Department?

A. Yes, sir.

Q. Now, between 1943 and the present time, Colonel, what occasion have you had to acquaint yourself personally with the general operation of Camp Pendleton?

A. Commencing in February of 1946 as the assistant to the job I now hold, I spent a great deal of time in studying all of the records, drawings of Camp Pendleton. That is to say we have a permanent file in my office of the [635] as-built drawings of every structure and its location with relation to all others at every post and station. And when a proposal comes in to raze a building, change its use, erect a new one or alter a structure we examine the records and from our personal knowledge and from an engineering viewpoint pass on the soundness of the project and as I said before, make our recommendations to the Marine Corps station development board.

Then at various times in the interval I have

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visited Camp Pendleton in varying frequencies and examined the various structures and operations going on thereat until the current year, when I probably spent upwards of a third or better of my time at Camp Pendleton.

Q. Actually on the scene personally?

A. That is correct.

Q. Does your particular assignment require a frequent inspection, personal inspection of the posts and stations of the Marine Corps?

A. It does.

Q. And in addition to that requires your personal analysis of the data and material sent in by the stations and posts to your office in Washington?

A. That is correct. I do not make all of the inspections myself. I have certain experts in my office and some of the inspections are made by myself and some are made by [636] them and their written reports are studied by me and their oral information.

Q. How large is your office from a personnel standpoint?

A. I have approximately 60 people.

Q. Are some of those civilians?

A. They are officers, enlisted and civilian.

The Court: What building are you located in?
The Pentagon?

The Witness: No, sir, we are up the hill in the Arlington Navy Annex. [637]

Q. (By Mr. Shryock): Now, Colonel, what is

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your responsibility to or relationship with the Quartermaster General of the Marine Corps?

A. The Quartermaster General of the Marine Corps has his establishment divided into three parts: one, a disbursing part, which pays the troops; one, an administrative part, that administers his office; and the other, the so-called supply branch, which is actually the operating force that he has, and I am in utilities and public works section of that branch, which is one of the principal seven subdivisions of his department.

Between the Quartermaster General of the Marine Corps and myself lies the executive officer and the brigadier general, who in matters pertaining to supply takes direct and personal cognizance. In matters pertaining to construction and development, I have direct access to the Quartermaster General.

Q. You have a direct responsibility to him in those matters?

A. That is correct.

Q. Colonel, can you tell us what relative importance the post known as Camp Pendleton enjoys in the over-all organization of the Marine Corps?

Mr. Dennis: I believe that I will object to that. I don't believe that the necessity for the use of water has [638] anything to do with the riparian rights of the parties.

Mr. Shryock: Now, the purpose of the question is simply to show whether or not Camp Pendleton is an important component of the Marine Corps.

(Testimony of Elliott B. Robertson.)

It seems to me that that is most relevant, because if it is a relatively unimportant component, then perhaps our concern has been misplaced in this particular case. I think it is of great interest.

The Court: In order to determine beneficial use, whether we are speaking of the Marine Corps or anything else, you have to set it in proper perspective. I have already decided that I consider a military use to be a proper riparian use.

Mr. Shryock: Yes, sir.

The Court: And that decision was reached at the suggestion of counsel made in advance of trial, that after the pre-trial certain questions which you gentlemen selected should be decided in advance as a guide in the conduct of the case.

I may say I am making this statement in the hope there is a newspaper man here—I do not see anyone—so as to avoid the impression that the publication of the pretrial opinion gave in the minds of some lawyer friends of mine, who are not familiar with the procedure, as to how it came about that I decided a lot of important legal questions in advance of trial.

I did it because you gentlemen asked me to. And when I say “you”, I mean all of you, and you collaborated with me [639] by writing four briefs. The Government wrote one, the State another, Mr. Dennis another, and Mr. Swing another.

And I think at the present time, as I see how smoothly things are running, you were right in suggesting that we do that, because it was your

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suggestion after the pretrial that this should be done. At the time I thought you were just giving me a lot of extra work. I realize now that probably in that manner you have saved a lot of work, not only for myself, but a lot of work for yourselves.

So to get back to the point I am making, in making that ruling there still remains the question of the way in which the water is being put to the particular use and the extent of that case.

You will remember, I think it was Mr. Grover, who, when I gave you a rather brief preview of what my opinion, which was not to come until five or six days afterward, was to contain—I think it was Mr. Grover who said that, even though admitting that theoretically a military use might be a riparian use, the question of the extent of the use is still a question. I agree with him that it is.

I have been rather quiet and haven't said many things about the law, because no occasion has arisen to amplify anything that was said in the opinion, but I thought this was a good occasion to first emphasize, more for the benefit of those present than just for you, as to the whys and whereofs [640] of the pretrial opinion, and then to point to it that in this particular case the particular use is still important.

You will remember the conclusions which I drew, and I wish you knew how many man-hours and night-hours I devoted to that. I will tell you that is the most difficult thing in that opinion. Those three pages of conclusions were rewritten at least

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half a dozen times, and half of them were written at night. I would get up at home, and think of another one, and write it out, because I wanted to make absolutely certain that I did not foreclose a factual right to anyone. And even when I determined the order of proof, I still indicated what each side would be free to prove. With the way the case has proceeded, I realize now that we have laid out the pattern in a manner which will be very beneficial to this entire litigation, not only as to the particular defendants as to whom we are trying the case at the present time.

So, to get back to the ruling, I think it is very important to find out, not only the fact that the camp is there and that the purchase was not only with the implied assent of the State, but as an actual cession of the State, so that, as the Constitution provides, there is no need for an actual cession now, as the cases I cited indicted. There is an actual cession by the State. So that now we should have the picture of the thing.

I don't like the word "picture," but there is a German [641] word that explains it better than anything else. It is "gestalt," g-e-s-t-a-l-t. They have even got what they call a gestalt psychology, and that is where you have to take several elements, not merely the object and the subject, but many, many elements, in order to consider a situation, to envisage it as a whole, and there is no equivalent word in the English language. The word "picture," as used in the ordinary sense, is about the nearest

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word I know of. So you will note how an American vulgarism, or a slang word, may supply the lack of a scientific word, such as the German word "gestalt."

So it is still necessary to see Camp Pendleton, not only as a particular establishment at the particular place, but its relation to the entire military establishment of which it is a part. That is why I think this inquiry, if it is not pursued too far, is material.

Mr. Shryock: Thank you, sir. And I will state that we shall endeavor to simplify it and to address ourselves to the particular matter of the long-range plans for Camp Pendleton, because I believe that no one will dispute the fact that prospective use, as well as present use, is a relevant factor.

Mr. Dennis: I want to make the grounds of my objection clear, your Honor, and that is, that the riparian rights of the United States in and to the waters of the Santa Margarita can be neither enlarged nor limited by the importance of Camp [642] Pendleton to the other military establishments maintained by the Marine Corps in the United States.

Mr. Shryock: Well, suppose you answer that one question as to its relative importance, as it has been determined, and then we will address ourselves to present use and long-range plans.

The Witness: To answer the question——

The Court: Just a minute. I want to say this: that that might be correct as an abstract proposi-

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tion, but when we read the late decisions of the Supreme Court of California, particularly I think it is the Hoberg case, and when they say that in determining whether it is a resort and the use of water which guests may make, which by strict common law would not be considered riparian rights—in determining that you have a right to consider all of the modern things that a man should have a right to do, then I think those late cases abandon entirely the old cases.

We had a man here who is a great believer in riparian rights, and who succeeded for many years, because of the influence of his name—his name was Weil—of holding down the riparian rights to strict common law, but there isn't a present writer anywhere in the country, and I have given you the Law Review writers, all of them that have come to my knowledge, from my friend Delgatrovich in San Francisco, to some of the other writers, who say that since the Weil [643] influence, the baneful influence, asserted itself, that now riparian rights must be understood in the light of an expanding need in a community, and must be applied to an expanding agriculture or to an expanding domestic use.

So it is very important in these matters, and if Camp Pendleton were owned by some hotel or resort operator, I would have a right to go into the matter. Supposing it was one of the Hilton chain and they were establishing a resort there. It would be proper to consider the relationship of

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that to the other. Suppose they used it for their overflow guests. Then I would have to consider whether that was too much of a burden. Otherwise I will be back to that very unfortunate phase that somebody who wrote the brief for the Government used—or, not the Government, but the State, where they said that, of course, a few soldiers patrolling the river would be all right, as though the Government of the United States bought that ranch and spent millions of dollars in order to have a patrol there. Against whom would they patrol? There are no enemies threatening that portion of the Santa Margarita, so that it would have to be patrolled.

So we have to be realistic in applying these old concepts that we borrow from the common law to the new conditions. So I believe that the relationship of this to the needs of the Government of the United States, which bought these, you see, is very important, because the State has the [644] ownership of the water which the others use only as a usufruct, whether they are appropriators or others, and is an interested party, and, therefore, its relationship to the matter, the relationship of this governmental activity to the others, is of grave importance.

The best proof of this, is when the opinion was released, I said something to the effect that I was surprised that the State of California should take the view that the Government could be induced to buy a ranch here only to find then it had no right to use the water for that purpose, because it was

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the contention of the defendant that a military use was not a riparian use. I have already ruled against that, and no power on earth is going to move me from that position. [645]

That is not going to be reargued again because I didn't waste days and days of work to reach that conclusion only to have it reargued.

What we are talking about is merely the meaning of the ruling and the lack of the evidence.

Immediately we had denials on the front page of the Times from some of the Congressmen, like Congressman Yorty and others, who interested themselves in this McKinnon bill which so far as I am concerned could well pass because it wouldn't settle, as Mr. Dennis said, it wouldn't settle *this* controversy as to the defendants. It would settle the controversy only as to one defendant and that is the Fallbrook Irrigation District.

But immediately after this statement there came denials.

"Of course we don't want the camp to go away. Of course we want the camp here. We have no such intention. All we want is merely to see that everybody has water."

We can't live in an abstraction. We can't decide lawsuits in a vacuum. This is my 26th year as a judge in this community and I found that you can't decide any question in a vacuum. Law arises out of the need of the community and you have got to apply the law to a particular situation and in

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order to understand it you have to understand the entire situation.

I am not going to permit the Colonel to testify about [646] the strategic value and all that, but certainly its relationship and whether it is an important link in a chain of establishments in the Marine Corps is a part of the case and a necessary part in order for me to determine whether there is beneficial use and the quantum of use.

You will remember I have left open the point as to the amount of the use and the reasonableness of it. It is still a question of fact.

Mr. Shryock: All right.

Mr. Dennis: If your Honor please, I don't believe that your Honor would take the position that if the Biltmore Hotel Company was the plaintiff in this action or the General Motors Corporation had decided to move a hotel or a factory into the Santa Margarita Watershed, that the extent of the use or the quantity of water to which they were entitled to put to beneficial use, could in any way be influenced by the fact that General Motors thought this was going to be one of their principal units, or that the Biltmore Hotel thought this was going to be one of their principal units.

Now, my objection only goes to this, that the fact that Camp Pendleton may have an important part in the future planning of the Marine Corps can neither enlarge nor restrict the rights which they have in and to the waters of the Santa Margarita River and that it cannot change the quantity of

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the water to which the Marine Corps is entitled. Nor can it change the place of use to which the Marine Corps can place the water under the laws of the State of California.

The Court: Nevertheless the Supreme Court of California has said that another riparian owner does not have the right to say to you to grow this instead of that and they did it in the Rice case.

Mr. Dennis: I agree with your Honor.

The Court: In the Rice case they said: "You can't tell me to put in alfalfa there because rice takes too long." And you can't tell the Government the use to which they will put the water.

Mr. Dennis: Your Honor, I am making no contention that if the plaintiff can put these waters to beneficial use on its riparian lands that we can restrict the nature of the use to which they are putting the water or the quantity of the water.

The only thing that we are asking this court to do is to say that if they put this water to beneficial use that it shall be determined on the basis of their military use or the basis of the agriculture use to which they are actually putting the water or are protecting their prospective rights.

The Court: That is what they have done——

Mr. Shryock: That is our precise point.

The Court: The constitutional amendment of 1928 took [648] care of that and the constitutional amendment said it is not only the actual use but the prospective use and what they have done here is translate that. That is why I asked those ques-

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tions yesterday of Major Bowen. He has figured the highest actual and prospective use and then translated those into a substitute use, military use and I asked specifically: "You claim for your military use merely the maximum of the actual and prospective use to which you would be entitled under riparian law," and his answer was "Yes."

I don't think you and I disagree on that.

Mr. Dennis: Maybe I misunderstood your Honor, but I should make myself clear in this respect.

If reasonable use for military purposes should be 125 gallons per man per day, the same way in which we measure it for domestic use in the state, and they only have, we will say, 500 men on the reservation, we do not believe that that allows them to prove a prospective use for agricultural purposes which could very well be 100,000 acre-feet per year and then divert that water to the watershed or to actually waste it and supply maybe each man on the reservation with 100 acre-feet per day.

In other words, their actual use is that use to which they can reasonably put the water at that time and if they have so many men and whatever your Honor feels is a usual [649] and a reasonable duty of water for the number of men which they have in the installation, either actually present physically there, that water which they have is a riparian use under your Honor's decision and is prior to any right which we might have by appropriation.

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However, as to the prospective use, so long as they have no use for that water—I mean if today they can put only 5,000 acre-feet of water to beneficial use on the reservation within the boundaries of the Santa Margarita watershed and there are 500,000 acre-feet going down the river at that time, anything over and above the 5,000 acre-feet which they are using, is surplus water and subject to appropriation.

The Court: Temporarily you are taking only one side of the question. You are taking only the actual use.

It is true that between the time—and in my opinion it makes it clear and while that opinion has only 30 pages it is one of the briefest opinions covering as many questions as I have ever written.

It is true that in determining actual use and prospective use a situation may arise where, between the time of the actual use and the prospective use, a surplus arises which you would be entitled to appropriate temporarily.

Mr. Dennis: That is our position exactly.

The Court: Then I agree with you. Then the question becomes a question of fact—how much of this substituted [650] use is the present use, and the prospective use will be envisaged in that light.

But in order to do that I have got to have this entire picture in order to determine the question.

Another thing to bear in mind is this, that if a military use is a riparian use then you cannot con-

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fine that use to the present use measured in agricultural use.

I am not expressing myself very well. Let us put it this way. Supposing that as of today if the water were put entirely to productive use, to agricultural use, you would need only so much water. Then of course there would be a surplus. But if as of today the Marine Corps uses not only what it would use agriculturally actually, but its prospective—what it is prospectively entitled to, then we are entitled to have the facts in the record and then it would be a question for me to determine as to whether the Government has or does not have a right to place the present prospective—to make the prospective use present by the facilities it has there.

I don't know that I have expressed myself well.

Mr. Dennis: That would be a question of reasonableness and then you will have to decide whether the prospective use which they have or expect to develop on the camp would be a reasonable use under our law.

The Court: I don't think we are in disagreement. That is exactly what I said in the opinion. There may be other [651] phases of the law that we will have to discuss after the facts are in and as you know we will discuss them. We will leave plenty of room for oral argument when the case is concluded as to the particular defendants.

I think this discussion is helpful and clarifies the basis of our understanding. I don't think, basically, we are in disagreement. Let us go on.

(Testimony of Eliott B. Robertson.)

Q. (By Mr. Shryock): Do you remember the question?

A. The question was the importance of Camp Pendleton.

The Court: That is right.

Mr. Dennis: Did your Honor overrule my objection?

The Court: I overruled your objection.

The Witness: The best approach is to start with the mission of the Marine Corps and then briefly describe its framework.

The principal mission of the Marine Corps by law is that of being the country's primary and principal amphibious striking force; for the seizing and holding of advance bases. And collaterally to that we are charged by law with the responsibility for the leadership and the developing of tactics and techniques in amphibious warfare for all the services of the country.

The Marine Corps is divided roughly into two halves: The fleet Marine Corps at Atlantic and fleet Marine Corps Pacific. They are striking forces in the named directions. [652]

Those forces are supported on each coast by parallel installation.

The Marine starts at Paris Island on the east coast and San Diego on the west coast in a recruit camp. They go to Camp Lejeune on the east coast and Camp Pendleton on the west coast for advanced infantry and amphibious training.

Some few of them, proportionately, go to the

(Testimony of Elliott B. Robertson.)

Marine Air Stations on the east and west coast which units are trained to support the ground elements.

The whole is backed up by a central school at the Marine Corps school at Quantico, Virginia, by a manufacturing depot in Philadelphia, by reservoir depots in Georgia and Mojave Desert and local depots at Pendleton and Lejeune and by forwarding depots at Norfolk and San Francisco.

Camp Pendleton is an amphibious training base. It is the largest in the world. And although we can't have the advantages of all climates there, it is the most complete in the world, we believe, and when coupled with its satellites for cold weather training, at Pickle Meadows up near Sonora Pass in California, Twenty-Nine Palms out in the desert for desert types of shooting and for desert training, it does comprise the most complete amphibious training base in the world.

Q. (By Mr. Shryock): Is that because it includes shores, mountains, beaches and desert? [653]

A. We have varied terrain of all kinds and we have the ocean and all types of beaches. We have many types of inland terrain and we have the cold weather aspect up in the mountains and the desert aspect at Twenty-Nine Palms.

Q. Is there any portion of the 134,000 acres, Colonel, which you could say that is not adaptable for military training of some kind?

A. There is no part of it that is not adaptable for military training.

(Testimony of Eliott B. Robertson.)

Q. Now, will you state briefly, Colonel——

The Court: How about the portion that at present is being used for grazing and other farming purposes?

The Witness: They are entirely subordinate to the military use. The policy of the Marine Corps is to place as much of the land in cultivation as we can, first, to protect the historic tenants there from a humanitarian standpoint and, to derive whatever income is available to the Government.

Incidentally, our records show that we have had a farming income at Pendleton to the Government which exceeds the original value paid for the ranch and its improvements.

The Court: What is the record, if you know the figures?

The Witness: Something over \$4,000,000. The income to the Government for the fiscal year 1951, I believe, was around a quarter of a million dollars. It has gone as high as a half million dollars.

The Court: Does that go to the general fund of the Government or does it stay with the Marine Corps?

The Witness: It is credited to miscellaneous receipts of the Treasury and is available to no one without an appropriation from Congress.

The Court: It doesn't remain with the Marine Corps in a special appropriation?

The Witness: No, sir.

The Court: It goes into the general fund of the United States Government?

(Testimony of Elliott B. Robertson.)

The Witness: Yes, sir, and the specific name is Miscellaneous Receipts, U.S. Treasury.

The Court: All right.

Q. (By Mr. Shryock): Now, Colonel, will you tell us the occasions on which Camp Pendleton has been designated as a permanent installation of the Marine Corps?

A. That designation is made by the Secretary of the Navy. It was made in 1944 and by reference to my file I can give you the exact date.

Q. You may so refer.

A. It was approved as a permanent Marine Corps establishment by Ralph A. Bard, acting secretary of the Navy, on the 21st of September 1944.

Q. Was there any later official action by the Navy Department reaffirming that designation?

A. That was the final designation as a permanent establishment. It had been established before by the Secretary of the Navy at its inception, but it was not in a permanent category officially until this date and it has not changed.

Q. Now then, Colonel, will you describe briefly the long-range plan now in existence with respect to Camp Pendleton?

A. We devised in 1946 a basic long-range plan for Camp Pendleton which was to ultimately, since it was a permanent establishment and since most of the structures there were erected for a life of only five or 10 years, to ultimately replace each and every one of those with a permanent structure.

The price or cost estimate at that time ap-

(Testimony of Elliott B. Robertson.)

proached \$250,000,000. We have been able to accomplish very little of that program due to limited appropriations.

The warehouses in Chappo flats originally were built of permanent construction. There are eight warehouses at a cost of about three and a quarter million now under construction in Chappo flats—permanent construction.

There is a barracks in Chappo Flats with a capacity of 1,400 men. That was built at a cost of about \$4,000,000.

Recently completed and not yet occupied and of permanent construction. [656]

We have under construction in four locations within the camp barracks and appurtenances to accommodate 13,000 men. They are not of the scale and level of quantity that we would like to have for permanent construction but due to limitations of funds and the necessity of getting the work done quickly, they are being built of reinforced concrete but very austere in nature.

The Court: I gather then the object doesn't have reference to size or enlarging the facilities so much as it does to making them of a permanent character.

The Witness: I didn't go all the way with my story, sir. I said that the plan at that time was to replace what was there.

The Court: Yes.

The Witness: There have been certain changes in the outlook of the Marine Corps, principally

(Testimony of Elliott B. Robertson.)

occasioned by a law passed by the Congress in the past year which drastically increased the permanent strength of the Marine Corps.

Q. (By Mr. Shryock): To what figure, Colonel?

A. Well, the law is in terms of combat units—three Marine divisions and three air wings and supporting troops.

When that law was passed we had to decide where to house those people and how to train them and so forth.

An allocation was made for Camp Pendleton which required an expansion over the then strength in the amount—that is [657] the expansion in the amount of 24,000 billets at Camp Pendleton.

Q. Well, is it not true that in referring to that recent law they have spoken of so many thousands of men or hundreds of thousands of men in the Marine Corps?

A. The law as it originally started was called “the 400,000 man Marine Corps bill,” but it was reduced to combat units and I am trying to figure whether I should answer you in numbers from the standpoint of classification.

The Court: I think that is sufficient.

Q. (By Mr. Shryock): I think that is what we had in mind.

Now, will you tell us what the present population of Camp Pendleton is, breaking that down into such categories as you think may help to present the picture.

A. As of October 30th there was a gross popu-

(Testimony of Elliott B. Robertson.)

lation of 49,123 people at Camp Pendleton, the Naval Hospital and the Naval Ammunition Depot.

They were divided 1,843 officers, 41,015 enlisted men, 2,531 civilian, employed and resident—not all employed but not all resident, but a combination. 2,906 dependents living on the station. 828 patients in the hospital. I have that breakdown by the three subdivisions.

The Court: “Dependents” are children of personnel?

The Witness: Wives and children and aged mothers, et cetera. [658]

Q. (By Mr. Shryock): Now, Colonel, this long-range plan of which you have been speaking, has that been reference to a particular fiscal or budget year?

A. It was. It is what the name implies, a long-range plan and within the budget limitations of any given year we tried to accomplish the current increment of that plan. The economy of the country would not support the long-range plan of all the services in any one year.

Q. Well, have you particularly identified a year in forming your conclusions as to the implementation of the long range plan?

A. We have had a current year plan beginning in 1946. No year in which we have had complete appropriations. The biggest appropriation year or years has been fiscal year '51-'52 and the work that I just described is the work being done from those appropriations.

(Testimony of Elliott B. Robertson.)

Q. Well, have you given any particular——

The Court: Just a moment. Let me ask one question—well, you finish your question. [659]

Q. (By Mr. Shryock): I was going to ask whether you had given any particular attention to the budget year 1954, or the fiscal year 1954?

A. We have.

Q. In what respect?

A. We have a program of items which we intend to present to the Congress in requesting appropriations for Camp Pendleton. Items of this nature have to be specifically authorized, that is to say, each structure and its location. We can't say we need barracks for 1,500 men and build them in Mojave instead of Camp Pendleton. You have to justify them at Pendleton, and then build them in Pendleton.

Mr. Shryock: Let me interrupt at this moment. Did the court care to ask a question?

The Court: I wanted to stop at that man hours, or at the number of men, in view of some statement that Mr. Dennis made. You say this is your best year, the most generous year?

The Witness: That is the best year as to money.

The Court: As to money. How about the proportion? Has there been any great change? Say, let's take it back to a couple of the lean years, and see if there has been any great deviation, because that may be very interesting. It may well be that these appropriations of money may mean better structures and not make any material change in the

(Testimony of Elliott B. Robertson.)

number of persons for whom you have to have water. [660]

The Witness: The current strength is the figure I read, as of 30 October.

The Court: Yes.

The Witness: The total strength for the 1954 budget is: Officers, 3,844; enlisted, 62,037; civilians, 2,527. Those figures, when added, with their prospective dependents, would give us a gross population of 105,456.

The Court: All right. Then go back to a lean year, and let me see how your increase in 1954 is. You have given the prospective.

The Witness: Yes, sir.

The Court: I want you to project yourself into the past and take a couple of the lean years, and tell me what your population was, if there has been any change.

The Witness: The lowest year is 1946. The military population of Camp Pendleton was 11,080, civilian population, 662, and the combined population of the Naval Ammunition Depot 930, which is, roughly, 11,000.

The Court: Just a minute. I am not going to ask for the intervening years. That gives you a good idea, in 1946, when we were disarming, and then you were all going on home. Then everything started up again. So I will leave it right there.

Mr. Shryock: I simply wanted to point out to your Honor that 1946 was well known as being the

(Testimony of Elliott B. Robertson.)

year of the great [661] demobilization for all of the services.

Mr. Dennis: But you will not foreclose me on cross examination from going into some of these, because I think the figures for the various years are important.

The Court: Mr. Dennis, I just did not want to break into the continuity.

Mr. Dennis: Just so I am not foreclosed.

The Court: I wanted to see the pattern, and see what develops. All right.

Q. (By Mr. Shryock): Now, then, Colonel, reverting to your reference to the long range plan for the budget year 1954, does that anticipate a realization of the long range plan if the Congress should appropriate the funds which you hope to get?

A. Realistically speaking, we don't hope to get enough, and we have not asked for the entire amount required, but the population strength on which the 1954 budget is based, and the numbers I gave, is now considered to be the permanent long range never to be reduced strength of Camp Pendleton.

Q. And that figure is 105,000, roughly; is that correct?

A. That is the constructed and projected strength.

Q. And is that budget actually to be submitted on that basis, whether or not it is accepted?

A. It has been submitted. [662]

(Testimony of Elliott B. Robertson.)

Q. Colonel, will you state whether or not you have had any occasion to go into the question of the required use of water, of the duty of water of persons connected with a military post, such as Camp Pendleton?

A. The Marine Corps has made a determination based on usage at all of our stations that the requirement is 200 gallons per day per capita.

Q. Now, is that a figure that you just took out of thin air, or is that a figure arrived at after some consideration of factors, and, if so, what factors?

A. As I said, it was derived from our experience, and I have a chart here, which I have extracted from the records of my office myself. And some of the files back down through are not available due to an evil called the record retirement program, but I will give some of them.

Marine Corps school, Quantico, Virginia, beginning in 1945, 266. In 1946——

Q. Excuse me, Colonel. The figures you are giving now are gallons per person per day, are they?

A. That is correct. In 1946, it was 374. The lowest gallonage at Quantico over the years was in 1952, of 293.

Camp Lejune, North Carolina first record 1948, was 216; 1949, 201; and so forth.

Paris Island, South Carolina, in 1947, 196; 1948, 267; [663] 1949, 235.

The Court: Have you corresponding figures for Camp Pendleton?

The Witness: Camp Pendleton, we have three

(Testimony of Elliott B. Robertson.)

records for 1943, '44 and '45, which I don't think are any good. Beginning in 1946, the first record of value, is 284; 1947, 285; 1948, 353; 1949, 268; and the lowest year there is 1952, in the amount of 152.

Q. (By Mr. Shryock): Well, Colonel, I think the Court might be interested even in those three years which you say are no good. I take it, those were combat years with tent construction?

A. I feel this, and I know that the maintenance and utility reporting system we have now was not in effect then.

Q. Oh, yes, if the records were inadequate, all right.

A. They are fragmentary reports, and the accommodations for the men were much more primitive.

The Court: What do you attribute the decrease in the amount per person to? Is it the better house-keeping? You see, I am beginning to use your terminology.

The Witness: It is due primarily to the stringent conservation and water restriction.

The Court: Well, that is good housekeeping.

The Witness: It has gone beyond good house-keeping, sir. We have things dirty for lack of water. [664]

The Court: I see. I am looking at the clock. Is this a good stopping point?

Mr. Shryock: I believe it would be, your Honor.

The Court: All right, gentlemen. Tomorrow morning at 10:00 o'clock.

(Whereupon, at 4:40 o'clock an adjournment was taken until 10:00 o'clock a.m. of the following day, Friday, November 7, 1952.) [665]

The Court: Ex parte matters. Cause on trial.

Mr. Shryock: Colonel Robertson, please.

ELIOTT B. ROBERTSON

having been previously sworn, resumed the stand and testified further as follows:

Direct Examination—(Continued)

Q. (By Mr. Shryock): Colonel, I believe when we concluded yesterday that you were testifying as to the matter of the 200 gallons per person per day for people in a military reservation such as Camp Pendleton.

Have you compiled any figures as to the acre footage of use, using that figure as a basis?

A. The requirement for the strength which we considered to be the permanent future strength of Camp Pendleton is approximately 23,500 acre-feet per year.

Q. Was that based on the long range figure of a total population of 105,000 persons that you mentioned yesterday?

A. That is correct. That number of people times the number of gallons, times the number of days converted to acre-feet.

Q. Now yesterday, Colonel, I believe you men-

(Testimony of Elliott B. Robertson.)

tioned the fact that in 1946 the military population of Camp Pendleton [668] was some 11,000 men.

Have you at my request computed the peak military population during the combat years of World War II at Camp Pendleton?

A. I didn't compute it but before I left Washington I examined the records at headquarters and determined that the population at its peak was approximately 56,000 military. I was unable to, in the time I had, to uncover the dependent population but it was very small.

Q. And that would have been during one of the years, 1943, 1944 or '45?

A. It was late 1944.

Q. Col. Robertson, in dealing with the water problems at Camp Pendleton has the matter of the construction of a dam figured in the plans of the Marine Corps and the Station Development Board?

A. We have determined it to be necessary to install a regulating structure on the Santa Margarita River at the site which has been referred to as the DeLuz site.

Q. What have been your results so far?

A. Well, we had a dam authorized by the Congress and had a partial appropriation. That authorization was rescinded by the last Congress.

Q. Was there anything which occurred prior to the rescinding of that authorization which indicated why you were [669] not having success in obtaining your appropriation for this dam?

A. There was quite a series of events but I think

(Testimony of Elliott B. Robertson.)

it came to a head in a hearing before the House Armed Services Committee, which I attended, wherein the chairman and other members of the committee stated that they had no desire to make additional investments at Camp Pendleton until such time as the Marine Corps could come in and assure the committee that we had an adequate amount of water to protect that investment.

Q. Was that after this litigation had been commenced? A. It was. [670]

Q. Now, one final thing. Returning to these figures of consumption per person of water, Colonel, did you compute how many persons would be supported by one acre-foot of water per year?

A. One acre-foot of water per year will support approximately four and a half, or a little less, 4.46 persons, I believe, throughout the year.

Q. And that is on the 200 gallons per day basis?

A. That is correct. And another computation I made: The 105,000 strength that we mentioned would require approximately $64\frac{2}{3}$ acre-feet per day.

Q. For the entire population?

A. That is correct.

Mr. Shryock: You may cross-examine.

Cross Examination

Q. (By Mr. Dennis): Colonel, are you familiar with the map which we have referred to as Map No. 1, which was furnished by the Government in response to the defendant Santa Margarita Mutual Water Company's written interrogatories?

(Testimony of Elliott B. Robertson.)

A. I have looked at that map several months ago.

Q. Are you familiar with the map which is in evidence as Plaintiff's Exhibit, I believe it is, 22?

A. I am.

Q. And on both of those maps there are various squares [671] and oblongs in black which have been placed upon the map in various localities, are there not?

A. That is correct.

Q. And those represent buildings?

A. They represent structures of various kinds.

Q. Either supply structures or barracks, or mess halls?

A. That is correct. Buildings, tanks, and what have you.

Q. And those buildings have been constructed on the military reservation from time to time?

A. That is correct.

Q. Now, I want the sheet that has the Naval Ammunition Depot. This is the sheet, entitled "Fallbrook." There are various roads with a circle in the center of a loop?

A. Yes.

Q. Those represent magazines?

A. They represent the approximate sites of magazines. Those are roads that are shown.

Q. What does the circle inside the loop represent?

A. Which circle inside which loop?

Q. Well, for instance, there is a circle inside the loop in the square 729——

A. '91.

Q. 7291. [672]

A. Point out the circle. That is a square.

(Testimony of Elliott B. Robertson.)

Q. That is a square. But not colored?

A. That is correct.

Q. And that would represent the approximate location of the magazine?

A. That is correct.

Q. And it is necessary, is it not, to locate those magazines at some distance from one another for the purpose of safety?

A. That is correct.

Q. It would be extremely hazardous to allow the public or agricultural or grazing activities in the immediate neighborhood of those magazines?

A. Grazing activities are carried on there.

Q. How about agriculture?

A. No cultivation.

Q. No cultivation. Those grazing activities are only carried on during the wet season of the year?

A. As to Fallbrook Naval Ammunition Depot, I cannot say for sure.

Q. Now, Colonel, I believe that all of the pumps and wells which are located in the Ysidora, O'Neill and Chappo basins are owned and operated by the United States of America.

A. They are owned by the United States of America. [673] The statement as to operation is not entirely true. There are a couple of wells which are supervised by the Government. As testified to by Mr. Taylor, there is an irrigation system lessee there. [674]

Q. And I believe that the buildings and structures which are shown on the two exhibits, which you just mentioned, have been erected on the prop-

(Testimony of Eliott B. Robertson.)

erty from time to time after it was acquired by the United States of America?

A. There are some structures shown on those maps which existed before our time.

Q. And when the additional structures were erected it was necessary to extend the irrigation system or the pipelines that were on the property at the time that you acquired the property?

A. The irrigation system to my knowledge has not been extended in our time.

Q. Have the pipelines been extended?

A. The pipelines—pipelines have been created and extended during our time.

Q. I used the term somewhat loosely as “the irrigation system” meaning the whole system for distributing water.

Mr. Shryock: I don’t believe he answered that, if you made it as a question.

Mr. Dennis: No, I just made that statement to clarify my question.

Mr. Shryock: I see.

Q. (By Mr. Dennis): Now, I believe yesterday you testified that an expansion in the amount of 24,000 billets at Camp Pendleton was expected. What did you mean by the term “billets?” [675]

A. I meant by “billets” a place for a Marine to sleep, live and eat.

Q. That would mean it is anticipated that the camp will be expanded so as to take care of approximately 24,000 additional men?

A. That is correct—that is in buildings.

(Testimony of Elliott B. Robertson.)

Q. And I believe that it is a fact that you have camp buildings and structures for the accommodation of men located in San Mateo Canyon, San Onofre Canyon? A. Yes.

Q. And other canyons on the ranch outside the watershed of the Santa Margarita River?

A. Yes.

Q. And it is anticipated that a portion of the expansion of the camp will take place in those portions of the ranch which are outside the watershed of the Santa Margarita River?

A. That is right.

Q. It has not been the custom in the past of stationing all the men inside of the watershed of the Santa Margarita River? A. No.

Q. And you don't anticipate that future policy will require they all be stationed within the watershed of the Santa Margarita River?

A. I think that the current situation is a pretty good [676] indication of how our plans are laid. Roughly 70 per cent of the people housed at Camp Pendleton now are watered from the Santa Margarita and an examination of our plans indicate to me that that figure is a pretty close approximation of what we would have then.

Mr. Dennis: I wonder if you would read that question back to me, please.

(Answer read.)

Q. (By Mr. Dennis): Now, have you under construction now or have you had at any time under construction any barracks, camp barracks and ap-

(Testimony of Elliott B. Robertson.)

purtenances outside the watershed of the Santa Margarita River?

A. Would you read the question please?

(Question read.)

A. Yes.

Q. Now, I believe that you testified yesterday that on October 30 there was a gross population of 49,123 people at Camp Pendleton in the Naval Hospital and Naval Ammunition Depot?

A. That is correct.

Q. Do you know how many of that personnel—what percentage of that personnel was stationed at the Naval Ammunition Depot?

A. A total of 486 people.

Q. And the balance were stationed at Pendleton?

A. Including the Naval Hospital.

Q. And that would be both within and without the watershed of the Santa Margarita River?

A. That is correct.

Q. Would you say that the number of people that were stationed at Camp Pendleton on October 30 was substantially the same for the water year commencing October 1 of 1951 and terminating September 30th, 1952?

A. As I understand the question is the population now the same as it was throughout that water year.

Q. Is it fairly constant?

A. It has been progressively increasing.

Q. Could you give me the number of people

(Testimony of Elliott B. Robertson.)

who were stationed at Camp Pendleton on October 1st, 1951?

A. I could not give it to you precisely. It is in the neighborhood of 30,000 military population.

Q. That is the military population?

A. Yes.

Q. And could you give me the approximate number of civilians who were employed or resident on October 1st of 1951?

A. I don't have that figure but I believe from the records I can make an estimation for you.

Q. Just approximately.

A. In the neighborhood of 900. [678]

Q. And can you give me an approximation or estimate of the number of dependents which were living on the station on October 1, 1951?

A. 1951?

Q. Yes, 1951.

A. My estimate would be 2800. [679]

Q. Could you give me an estimate of the number of patients which were in the hospital at that date?

A. In the neighborhood of 750.

Q. Now, for the 1st of October for each of the years, commencing with 1942, could you give me your best estimate of the number of officers, men, civilians, dependents, and patients which were on the reservation?

A. I cannot do that from the records I have with me.

Q. How far back do your records go that you have with you?

(Testimony of Elliott B. Robertson.)

A. I could give it precisely for the 31st of October, or the 30th of October, this year.

Q. Well, could you give me——

A. (Continuing) I can give you the 1953 budget plan and the 1954 budget plan. That still does not answer your question.

The Court: He wants the prior years.

Mr. Dennis: I want the prior years, Colonel, and if you have any data——

The Court: You started on that yesterday, and I said I was not interested, but Mr. Dennis said he might be.

Q. (By Mr. Dennis): If you have it for any other date during the year, I don't want to hold you to October 1st or October 31st. Do you have it for any date for each year? And could you give me the number of officers, men, civilians, [680] dependents, and patients in the hospital?

A. I have no information as to patients back through the time with me. I have no information—I do have some information as to dependents.

Q. Have you information relative to enlisted men and officers?

A. Not broken down, and it would have to be estimates.

Q. I mean, as to military personnel, have you the figures as to military personnel?

A. I could give you approximations. I could not break it down.

Q. Would you do that?

A. In 1943, there was a population—now, we

(Testimony of Elliott B. Robertson.)

have fluctuations in here. It was a growing situation, and are you addressing yourself to an average or a peak?

Q. An average would be all right.

A. In 1943, about 25,000.

Q. That would be military personnel?

A. That is correct.

Q. And plus civilians?

A. That is correct.

Q. That would be military personnel and civilians and dependents?

A. There were about 180 dependents that year.

Q. That would be in addition to the 25,000? [681]

A. Yes. The 25,000 estimate is loose enough so that the 180 could be plus or minus.

Q. Now, for 1944 have you an estimate?

A. An average would be between 45,000 and 50,000, and a peak of 56,000 military.

Q. And for 1945?

A. An average would be about 28,000.

Q. For 1946?

A. In 1945 is where we began having a considerable number of dependents, roughly, 1800. And in 1946, '47, and '48, we had roughly 2200 dependents.

In 1946 the population of Camp Pendleton was about 11,000 military, or about 11,000—period.

Q. For 1947?

A. The population was about 13,000.

Q. For 1948? A. About 13,000.

Q. 1949? A. About 19,000.

(Testimony of Elliott B. Robertson.)

Q. 1950?

A. We grew to about—this is still military—about 24,000.

Q. And for 1951?

A. We grew to about twenty-eight or twenty-nine thousand. [682]

Q. What do you figure your average will be for 1952?

A. Our budget in strength for 1952 is 56,000.

Q. Do you think you will make an average of about 56,000 for 1952?

A. We will make an average of about fifty-two or fifty-three thousand.

Q. Now, could you give me the dependents for 1949 on?

A. 1949, '50 and '51, there were about 2,550 dependents.

Q. And for 1952?

A. The same number of dependents to date. However, we have a new activity there. We have under construction 562 dwelling houses, and have on the site 250 trailer units which are being hooked up.

Q. That is the Wherry project?

A. The 562 are the Wherry project under Title 8 of the Housing Act, and the trailers are being provided under Title 3.

Q. Will they be approximately in the same location?

A. They will not.

Q. Where are the trailer units being located?

A. The trailer units will be on South Coast Mesa.

(Testimony of Elliott B. Robertson.)

Q. Out or inside the watershed?

A. Some of each.

Q. Now, the figures that you gave me for an average [683] military personnel for the years 1945 to 1952, inclusive, would that include civilian personnel as it did for 1943 and 1944? A. Yes.

Q. Now, I believe that one of the first activities of the Government after it acquired Camp Pendleton was to fence the entire camp so as to keep out trespassers and intruders?

A. I don't believe the entire camp has been or is fenced. [684]

Q. At the present time? A. Yes.

Q. Is the entire southern and eastern boundaries? Calling your attention, Colonel, to the map which is known as Map 1 would you say that the boundary line starting at the Pacific Ocean in the vicinity of San Luis Rey River lagoon and extending up to Morro Hill and extending northerly to a point just south of the Riverside County line has been fenced?

A. It has at every point that I have inspected.

Q. And it has been the custom to maintain patrols and sentries so the public can't obtain access easily to the reservation?

A. That is correct. However, the sea coast is not fenced and there is no patrolling along Highway 101.

Q. It is fenced along Highway 101 however?

A. I believe there are highway fences but not Government fences.

Q. And signs notifying the people that it is a

(Testimony of Elliott B. Robertson.)

military reservation and a violation of the law to go on the reservation? A. That is correct.

Q. Now, Colonel, I believe that you said that you anticipate to have approximately 105,000 people on the reservation at some future time?

A. That is correct.

Q. Can you break that down into military personnel and [685] civilians?

A. I gave the figure of officers, enlisted and civilians yesterday.

There are 3,844 officers. Our planning factor is that 75 per cent of the officers will be married and accompanied by their dependents and desire quarters therefor.

The actual figure is somewhat higher, around 87 or 88 per cent of actual marriages but we do not figure that all of them will be accompanied by dependents and require quarters.

That leaves us 961 bachelor officers. Our planning factor is two and one-half dependents per family which gives us 7,280 officer dependents.

The gross officer population, including their dependents will be 11,052.

The total enlisted population is 62,037. Our planning factor for housing purposes, which do not reflect the true number of marriages—there are actually about 38 per cent of the people married, enlisted people married. Our planning factor for housing is 20 per cent will be married and accompanied by their dependents and desiring quarters

(Testimony of Elliott B. Robertson.)

if they were available and meriting quarters under the law.

That leaves 49,630 men to be housed in barracks. I did not give the number of married families. 12,407 and using the same factor of two and one-half dependents per married military person we have a dependent population for enlisted 31,018, giving us a gross enlisted population, including [686] their dependents of 93,055.

The total number of civilians to be on board is 2,527. This station has been declared isolated for housing purposes by the head of the department and that under current regulations makes us eligible to house on the reservation 75 per cent of those people.

We feel in this case, however, that due to the age of the post and the capabilities of the surrounding community that we will never house as high as 75 per cent of the 2,500 or something, in the neighborhood of 1,800.

Actually we plan to house 160 families. Those 160 families would be accompanied by the usual two and a half dependents giving us roughly 400 dependents.

The remaining civilians over these families are 2,367. They live somewhere else. We do not take full credit for them but since they are there to work eight hours plus their going and coming time, we have taken one-third credit for each civilian living off the post or an effective additional civilian population of 789 persons, giving us an effective net

(Testimony of Elliott B. Robertson.)

civilian population of 1,349 as compared to a gross of 2,527.

Q. And is the civilian population which you gave the figures for the years '43 to '52 housed on the reservation?

A. We have never exceeded 160 families.

Q. Now in your computation as to the amount of water which would be required in gallons per day—I believe it [687] was 200 gallons per day per military personnel did you apply that same figure to the civilians which are going to be housed on the premises?

A. The figure of 200 gallons per day was established not to cover just military personnel but to cover a cross-section of the military establishment so that it is applied to the dependents and military alike. And as I explained due to the fact that the employed civilians who reside away are there roughly more than a third of the time, we only take a third of that as a credit. The adjustment is made at that point.

Q. Now, Colonel, you gave us some figures yesterday as to the amount of water used per man on certain military reservations on the east coast. Have you the figures for the military installations on the west coast, for instance the El Toro Marine Base?

A. I have no figures for El Toro. It is entitled "A Marine Corps air station." It is not financed and managed by the Marine Corps and I have no

(Testimony of Elliott B. Robertson.)

information of my own knowledge in connection therewith.

I have some other stations, however.

Q. On the west coast?

A. Just a moment. I have the San Diego Marine Recruit Depot.

Q. What is the station there?

A. Marine Corps Recruit Depot San Diego.

Q. What do your figures show on the Marine Corps Recruit Depot?

A. For any specific year?

Q. For 1951-52.

A. 1951 shows 133.

Q. Gallons per day?

A. Gallons per capita per day.

Q. For 1950? A. 329.

Q. Gallons per day? A. Per capita.

Q. And for 1949? A. 258.

Q. And for 1947? A. 248.

Q. And for 1946?

A. I have nothing earlier.

Q. Have you any other bases or stations in San Diego County? A. I have not.

Q. Have you any figures for any bases or stations which might have been maintained by the Navy? A. I have not.

Q. Or for the Army or for the Air Corps?

A. I have made no attempt to do that. These figures [689] were compiled and the figures established on the basis of Marines.

Q. Now, do you have the personnel that has

(Testimony of Elliott B. Robertson.)

been stationed at the Naval Ammunition Depot since it was established?

A. I must say that these figures were acquired by me from sources outside of my office, from inquiry and I do not know of my personal knowledge.

There are 80 dependents or were, from 1945 to 1952.

Q. That is dependents?

A. Dependents, and the combined military and civilian population was in 1942, 455; in 1943, 670; in 1944, 923; in 1945, 1,160; in 1946, 930; in 1947, 345; in 1948, 265; in 1949, 252. I think I have the information for the later years. 1950, 256; 1951, 360 and 1952, 412.

Q. Now, Colonel, are you familiar with the amount of water that the State of California figures amounts to a reasonable use for domestic use per person per day in gallons? A. I do not.

Q. You made no effort to ascertain what the department has determined or the Division of Water Resources, the state engineers, have determined as a reasonable amount of water for domestic purposes per person per day?

A. I have not. I have studied the text books that are available to our profession and I have concluded that a cross-section figure for a city like Los Angeles or a [690] County like Los Angeles County cannot be applied to a military establishment, but that you would have to take a selected area of that place for a comparison.

For example, there are people who never wash

(Testimony of Elliott B. Robertson.)

at all. There are people who wash on Saturday night. There are people who wash every day and we believe that our military establishment as it should be conducted, is comparable to a high-class suburb. [691]

Q. I agree with you on that, Colonel. Would you say that the water which is consumed by the military establishment is primarily consumed for what would ordinarily be termed domestic use, that is, bathing, cooking, and cleaning facilities, as distinguished from maybe the flushing of streets or the washing of military equipment?

A. Primarily it is. However, the washing of military equipment is a major consideration at Camp Pendleton or any amphibious base, where you have to wash salt water out of the military equipment.

Q. Correct. Have you made any study to determine what portion of the water used at Camp Pendleton has been used in connection with military equipment? A. I have not.

Q. Now, Colonel, you are familiar with the various sewage plants that are operated on Camp Pendleton and the Naval Ammunition Depot?

A. To some degree.

Q. Is it my understanding that all of the water from the main camp and from the Ammunition Depot is discharging into a sewage system?

A. There are several systems there.

Q. But, Colonel, calling your attention to the map which we have referred to as Map No. 1, which

(Testimony of Elliott B. Robertson.)

was supplied by the Government in response to the interrogatories of the [692] Santa Margarita Mutual Water Company, is the water which is obtained from the installations which are installed on Pilgrim Creek, in the watershed of Pilgrim Creek and the watershed of Windmill Canyon, and I believe we referred to Rattlesnake Canyon, the Naval Hospital and the Supply Depot, which overlie Middle or Chappo basin, all discharged into the sewage plants?

A. They are discharged into sewage plants, that is correct.

Q. The same would be true for Camp Delmar?

A. That is correct.

Q. And, as I understand it, at Camp Delmar are the installations which begin on the southerly boundary of the camp along the Pacific Ocean and extend to approximately the tidal marshes; is that correct?

A. That is correct.

Q. Does all the water which is furnished to the Naval Ammunition Depot discharge into one of the sewage plants?

A. All that arrives into the sewage pipes.

Q. And I believe that would include all water which might be used for cooking or bathing?

A. All that is discharged by the user into the sanitary system.

Q. I believe those plants recover a considerable percentage of that water, which is pumped back into the basin? [693]

A. That is correct.

Q. Would you say, or have you made any studies

(Testimony of Elliott B. Robertson.)

to determine the per cent of the water that is recovered in those plants?

A. I have made no personal study. I have knowledge of figures that have been quoted on it.

Q. Would you say approximately 90 per cent of the water is recovered?

A. It is in the neighborhood of 65 or 70 per cent by my estimate, which is off the cuff.

Q. Now, I believe that you testified that when buildings were first constructed on Camp Pendleton, that they were more or less of a temporary nature, and that you anticipated you would replace them with permanent structures.

A. Due to the material restrictions which existed during the time of the war, those buildings were necessarily erected of substitute and substandard materials, with a projected life in some cases of five years, and in most cases of ten years, that is to say, an economically projected life of that time.

There were numerous permanent buildings that could last or have lasted for hundreds of years, and it could be done here, but not economically, and, therefore, it is our long-range plan to replace them with buildings which could economically be kept up. [694]

Q. Will the permanent structures be erected on the same sites as the temporary structures?

A. In general, yes. In that connection I might say that we have a long-range plan which roughly envisions the use of the camp, which would place the structures in roughly the same places they are.

(Testimony of Elliott B. Robertson.)

However, there are engineering considerations that have to be taken into account, and, with that in mind, we have gone to the Congress and had appropriated to us the sum of \$1,000,000 for detailed architectural and engineering studies which would lead to the specific location of permanent pipe lines, buildings, roads, et cetera.

Q. Now, Colonel, calling your attention again to Map No. 1, and, in particular, to that portion known as Chappo or Middle basin, I notice that the landing strip is located overlying the basin just immediately south and east of the bed of the stream. Does that correctly locate the landing strip?

A. That is correct.

Q. Is that a permanent installation?

A. The strip is, yes.

Q. And the series of black rectangles which lie just east and south of the Topeka & Santa Fe Railroad track and overlying Chappo basin, that is a permanent installation?

A. That is the supply depot——

Q. The supply depot?

A. ——and is permanent. [695]

Q. Then I notice there are some rifle ranges which are located on the opposite side of the river bank overlying Chappo. Is that a permanent installation or temporary installation?

A. The range itself is one of those things that can be moved without much effort, and they often are. I wouldn't class it either way.

Q. You did, however, select that site because of

(Testimony of Elliott B. Robertson.)

its location to the main camp and the character of the terrain?

A. That is correct. However, at that particular range, we are now building a camp very close to it, and the effect of the camp may be to move the range.

Q. And as additional men are brought into the camp, it will be necessary for you to restrict the agricultural operations on the ranch?

A. As additional men come in, and if and as the water supply fluctuates, we will fluctuate the amount of water made available for agriculture.

Q. I wonder, Colonel, if you will answer my question. It is going to be necessary, if additional men are brought on to the camp, that the agricultural acreage will be decreased to give more training areas?

A. Now, you are speaking from a training-area standpoint?

Q. From a training-area standpoint. [696]

A. It is entirely possible that a good portion or a large portion, possibly all, of agriculture would have to be suspended there, under certain conditions.

Q. That is, if additional men were brought on?

A. If the men are brought there in that kind of number, that is correct.

Q. You understand when I refer to "the ranch," I am referring to the reservation?

A. That is right.

Q. Now, calling your attention, Colonel, to the United States Naval Hospital, which is located on

(Testimony of Elliott B. Robertson.)

the westerly side of O'Neill Lake, and which overlies a portion of O'Neill basin, would you say that is a permanent installation?

A. It is permanent in the same sense that Camp Pendleton is a permanent establishment. The structures themselves are in the same category, generally, as the structures at Pendleton, with the exceptions I noted yesterday, and some of which you noted today. The Bureau of Medicine and Surgery, which is the operator and manager and financier of that hospital, have in their current budget permanent structures for that place.

Q. Colonel, have you any idea of the acreage which is occupied by the supply depot and the air strip?

A. I have never attempted to ascertain it.

Q. Now, Colonel, I believe that you testified on [697] direct examination that there was a bill in Congress to appropriate funds for the construction of a dam, during the last session of Congress; is that correct?

A. I don't believe I said that yesterday, but it is a fact.

Q. It is a fact. Could you tell us the type of dam which you propose to construct at the De Luz site?

A. Did you say "propose" or "proposed" with a "d"?

Q. Well, the bill asking for an appropriation requested a specific sum of money, did it not, for the construction of a dam of a specific type and capacity?

(Testimony of Elliott B. Robertson.)

A. You want to know what was proposed at that time?

Q. That is correct.

A. There was a large dam proposed at that time, based on knowledge which was then available to us, which predicted would give a certain safe yield per year, and our investigations in connection with this case and in connection with our planning for Camp Pendleton have indicated to us that the basic information there in some cases was in error, and that it is not feasible or economically possible to build a dam with that yield, and we have no intention of pursuing that plan.

The authority was rescinded, and we have a different type of structure now being prepared for submission to Congress. [698]

Q. However, the dam that was anticipated at that time had a storage capacity in excess of 200,000 acre-feet?

A. Something in that neighborhood.

Q. And the studies which you had in your possession at that time had indicated it had a safe yield of in excess of 20,000 acre-feet, did it not?

A. Yes.

Q. And the studies which you had in your possession were obtained as the result of rather prolonged joint investigation of the Bureau of Reclamation and the Corps of Army Engineers, were they not?

A. I am not sure that I ever saw any Bureau of Reclamation work. However, on examination of the

(Testimony of Elliott B. Robertson.)

study which you mentioned, we found several factors which in layman's language would say to me the report is no good.

Q. Well, last year—I believe it was last year, and you correct me if my statement is not correct—the Corps of Army Engineers did make a rather lengthy and exhaustive report and recommendation in regard to the construction of a dam, an investigation of the Santa Margarita River and for the construction of a dam at the De Luz site?

A. That is correct.

Q. And that report has been available to your office?

A. I have read it.

Q. And it has been available to the Office of Ground [699] Water Resources at Camp Pendleton?

A. I cannot answer that question. I do not know.

Q. You do not know whether the information which was contained in that report was given to Mr. Henderson, Mr. Worts, and Mr. Muehlberger, who testified here previously?

A. I don't know. I might say in that connection that from my standpoint the reason that my office did not make it available is that we wanted independent results.

Q. You did study the report, however, after it was consummated by the Army Engineers?

A. That is correct.

Q. Do you know how long a period of time was consumed in the preparation of that report?

A. Something on the order of a year, 15 months.

(Testimony of Elliott B. Robertson.)

Q. Didn't the Bureau of Reclamation start gathering facts for that report in 1947?

A. I have no knowledge of the Bureau of Reclamation's activities in that connection.

Q. Now, I believe yesterday that Mr. Taylor testified that there had been some dams constructed in the bed of the Santa Margarita River, which he termed, I believe, spreader dams. Are you familiar with those dams?

A. I think Mr. Taylor very aptly described them when he called them sand dikes. As a conservation measure we have at various points along the stream with a bulldozer [700] pushed up the native material, largely sand, and in some places a foot high and in some places eight feet high, with a view of arresting the flow of water when it comes.

In the rains last winter, the first few days, the first one held, and the next time it lasted two or three days and went out, and, finally, the last one went out. It was an effort to retain the water and force it, or hold it while it percolated in the basin.

Q. And there were similar dams that had been constructed in the bed of the Santa Margarita River prior to the time that you acquired the property?

A. That I can't testify.

Q. Well, there are dams of the type which you have just referred to which obstruct the flow of the river and which did not go out during the last season, rainy season, are there not?

A. None that I know of.

Q. In other words, so far as you know all of

(Testimony of Elliott B. Robertson.)

the dams that were placed across the river in Chappo and O'Neill or Ysidora basins were destroyed by the floods?

A. They were progressively destroyed until finally the last one went out.

Q. Now I believe that the past history of Camp Pendleton indicates that the personnel will fluctuate considerably over a period of years?

A. It indicates to me that it has fluctuated.

Q. And it is reasonable to believe that it will fluctuate in the future due to the fact that it is a military installation?

A. The Marine Corps' official view on that is that we will not fluctuate at Camp Pendleton and we have so stated this year in our budget submission to the Congress, in view of the very recent Congressional action fixing the minimum [702] size of the Marine Corps as to combat units.

Q. That will be over a period, we will say, of four or five years, but in the event the present emergency disappears that we are confronted with, the Marine Corps, like all other military installations will probably be reduced, won't they, Colonel?

A. That is conjecture. The law is permanently on the statute books.

Q. Now I believe that you testified that the plan of constructing a dam at the DeLuz dam site would impound some 200,000 acre-feet of water and that that plan has been abandoned by the Marine Corps as being impractical?

A. That specific plan was never adopted by the

(Testimony of Elliott B. Robertson.)

Marine Corps after we studied the thing.

Q. But you had come to the conclusion that that is impractical and economically unsound?

A. That is right.

Q. And at this time the only plans which you foresee for the impounding of water on the river would be a dam to spread water so that it percolates into the three basins will be materially increased?

A. No, that is not correct. Our idea as testified by Mr. Henderson, is to build a structure for regulation. As I understand your question you are referring to something similar to the sand dikes just described. [703]

Q. No, more permanent, a little more substantial.

A. We are talking about a structure the studies of which are not complete.

Q. The studies are not complete?

A. But from a preliminary view somewhere between fifty and sixty thousand acre-feet of storage or capacity I should say, with a view of arresting the high flow until the basins below will take it and then release it for recharge.

Q. After the basin is filled to capacity what will you do with the water that is impounded behind the dam?

A. Oh, I don't know at this time and at this stage of the study that there would be any in the dam at that point.

Q. Is it anticipated that water will be stored

(Testimony of Elliott B. Robertson.)

on more or less a permanent basis in the event that the basins are filled to capacity?

Q. With the projected population of Camp Pendleton and the development now planned the basin would almost never be totally full except immediately at the end of a period of high precipitation.

Q. Well, Colonel, it is true, is it not, that it is not going to be possible to obtain a sufficient quantity of water during the dry season of the year from the stream flow of the Santa Margarita River to meet the needs of the expanded camp and that the only way that you will secure adequate water during the dry season is by permanent storage or an impounding [704] of the waters?

A. Well, it is not possible to obtain the need from the direct flow of the stream during that season. However, the basins comprise a large underground reservoir where we propose to store our water and use the dam for recharge thereof.

Q. In other words, you propose to store water underground as well as on the surface?

A. That is correct.

Q. And it is true that there would be years, based on the historical studies which you have made, that there would be years in which you probably could not supply or obtain a sufficient supply of water from the stream flow to meet the needs of the expanded camp?

A. From the direct flow of the stream.

Q. From the direct flow of the stream. So it

(Testimony of Elliott B. Robertson.)

would be necessary for you to fall back on storage, either underground or surface?

A. That is correct.

The Court: The underground storage is not localized at all?

The Witness: Yes, it is. It is pretty well defined as was testified to by Mr. Worts and others.

It runs from basically the lower end from Ysidora Narrows up to the confluence with DeLuz.

Mr. Dennis: I don't believe that Col. Robertson has any different thing in mind in storing water in the basins that underlie Camp Pendleton than the Vails when they obtained a permit from the State of California to appropriate waters and store them in the Pauba Basin. I mean it is just a question of storage—whether sometimes you store water underground and sometimes you store it on the surface.

If you can store it underground I think it is acknowledged that that is a better method of storing than on the surface because you don't have the loss from evaporation, that is, provided you have well defined basins such as the plaintiffs have testified to in this case.

The Court: Well, except that the underground basin can be pumped by anybody because it is not under the control of any particular person. While if you have it in a surface reservoir or storage reservoir it is subject to control of the person who controls the reservoir.

Mr. Dennis: In this instance, your Honor, where

(Testimony of Eliot B. Robertson.)

the evidence is that the basin entirely underlies the plaintiff's property and nobody has any rights to pump—pumping is done either under permit from the plaintiff and the same thing exists in the Vail basins. All portions of those underlie the Vail properties and therefore they are willing to store it underground rather than on the surface and I am sure Mr. Vail's basins in the Temecula alluvial [706] section—there is only a portion of that underlying the Vail property and they would have stored all the water in the surface reservoirs but by controlling the basins they prefer that and I think it provides better storage.

The Court: They don't control the flow of the basins as they would control the surface storage. You just pump it in there and leave it there and it finds its own level and goes in whichever direction it desires.

Mr. Dennis: That is correct. I think the evidence in this case—that is the Isopach map which I believe is Plaintiff's Exhibit 11 and the profile which I believe is Exhibit 12, show the definite limitation of the basin and the material through which the water flows.

The Court: That is true, but both in law and factually it is a very different thing between underground storage and surface storage.

Mr. Dennis: I think that is true. I think the Plaintiff's rights in regard to the two types of water are somewhat different, too, under the laws of the State of California.

We haven't argued that yet but it is something that I propose to argue at the close of the case.

I think your Honor got a preview of it, perhaps, from my brief which I filed.

The Court: All right.

Mr. Dennis: That is all. [707]

The Court: Any redirect?

Mr. Shryock: Mr. Grover?

Mr. Grover: No questions.

Mr. Shryock: No questions. Thank you very much, Colonel.

The Court: We will take a short recess.

(Short recess.) [708]

The Court: Call your next witness.

Mr. Shryock: Your Honor please, I should like to state briefly the purpose of calling our next witness.

The Court: Yes.

Mr. Shryock: For some reason there seems to have been some doubt cast upon the exact nature of the title that we acquired, particularly as demonstrated in one of the briefs. We have no wish to close our case without giving as complete a story as possible of the entire property and the nature of our title, and we, therefore, would like to call Mr. Agnew to the witness stand.

The Court: All right.

DAVID W. AGNEW

called as a witness on behalf of the plaintiff, being first duly sworn, was examined and testified as follows:

(Testimony of David W. Agnew.)

Direct Examination

The Clerk: What is your name, please?

The Witness: David W. Agnew.

Q. (By Mr. Shryock): Will you state your residence, please, Mr. Agnew?

A. 930 Dartmouth Drive, Alexandria, Virginia.

Q. And what is your present permanent occupation?

A. I am an attorney with the Department of Navy, in the Bureau of Yards and Docks.

Q. Are you a member of the bar of the highest court [709] of any state?

A. Yes, sir, the State of Wisconsin.

Q. How long have you been with the Bureau of Yards and Docks of the Navy Department?

A. Since 1942; July, 1942.

Q. Has your position in that Bureau been one of attorney? A. That is right.

Q. Will you describe briefly, Mr. Agnew, the nature of the mission of the Bureau of Yards and Docks, as it relates to the real estate of the Navy Department?

A. The Bureau of Yards and Docks acquires title or any other interest in real estate in lands desired for use by the Department of Navy.

Q. In the course of accomplishing that mission, is it the function of the attorneys in the Bureau of Yards and Docks to examine into the nature and extent of the titles acquired by the United States? A. It is.

Q. Have you had occasion, Mr. Agnew, to exam-

(Testimony of David W. Agnew.)

ine the title acquired by the United States to the entire military reservation known as Camp Pendleton, which we have been referring to in this proceeding? A. Yes, sir.

Q. Will you state your professional opinion as to the [710] nature of the title which we acquired, and the nature and extent of the riparian rights which went with that title?

A. We acquired the fee simple title to the property, together with, in my opinion, such rights to the use of water from the Santa Margarita River——

Mr. Dennis: Just a minute. I object to the witness giving his opinion as to what rights they acquired. That is a matter of law to be determined by this court from the documents upon which the plaintiff acquired title, and the maps and testimony in this court as to the extent of the watershed.

Mr. Shryock: I am asking for the professional opinion of a person highly experienced in the specific field as to which my question is directed, and I believe that he is an expert attorney and he is entitled to express opinion evidence as to this title.

The Court: A researcher of title can state, after a search of title, that so many acres were transferred, or something like that, and that the muni-ments of title called for so much, and give the language, but it seems to me that the question is a little broader than that, Mr. Shryock.

Q. (By Mr. Shryock): Then I shall ask you, Mr. Agnew, if you will state what conclusions you

(Testimony of David W. Agnew.)

have reached as to the riparian nature of the lands which were acquired by this condemnation. [711]

Mr. Dennis: Pardon me. Could I have that question read?

(The question was read.)

The Court: Now, this is the first time you have spoken of condemnation.

Mr. Shryock: Well, then, may I ask the witness, if the court please——

The Court: Let me ask him a question.

Your search of title resulted in showing the means of acquisition were what?

The Witness: Condemnation proceedings, sir, except for approximately 112 acres lying in Orange County, which we acquired by deed, and a small acreage which was always Government-owned, and was transferred to the Navy by the Department of Interior under a public land order.

Q. (By Mr. Shryock): And how much was that latter acreage?

A. I am not sure how much it was. It was relatively small. I would say less than one thousand acres.

Q. All right. Then will you describe the condemnation proceedings, the steps that were taken, and the muniments of title which the United States acquired as a result of those proceedings?

A. As to the Naval Ammunition Depot, which was acquired first, containing approximately 9,000 acres, a condemnation proceeding was instituted late in 1940, I [712] believe, or late in 1941, and

(Testimony of David W. Agnew.)

thereafter a decree of taking was filed, the estimated just compensation deposited with the court, and the fee title vested in the United States.

The Court: Do you know what the date of the decree is?

The Witness: I have it here, sir. In the case of the United States of America, plaintiff, vs. 9,147.55 Acres of Land, More or Less, in San Diego County, California, Rancho Santa Margarita, a corporation, et al., defendants, No. 139-Civil, the decree on declaration of taking was entered on the 21st day of January, 1942, in the District Court of the United States, Southern District of California, Southern Division.

Q. (By Mr. Shryock): Mr. Agnew, have you caused to be prepared for your use a map of the property embraced in Camp Pendleton and had appended thereto a legend? A. I have.

Q. Do you have that before you?

A. I do, sir.

Mr. Shryock: May the record show that I have furnished a copy of that to Mr. Dennis.

Do you have more than one copy?

The Witness: Yes.

Mr. Shryock: I now am furnishing one to Mr. Grover.

The Witness: Commander Shryock, let me take that one, will you, please? [713]

(The document was handed to the witness.)

Mr. Grover: Thank you.

The Court: All right.

(Testimony of David W. Agnew.)

Q. (By Mr. Shryock): Does the legend on that map summarize the acquisition of the various parcels?

A. It does.

Q. Would you briefly describe, then, what the legend discloses?

A. The area outlined in red, containing approximately 122,202.72 acres, was acquired in a condemnation proceeding designated as Civil-197-SD.

Q. And the date?

A. The note here shows a date of December 31, 1942.

Q. Is that the date of acquisition?

A. Let me check that, will you, please?

Mr. Shryock: Yes.

The Court: That has been referred to as a purchase. Of course, a condemnation is an enforced purchase, and I presume the reason why it was done is that, after the action was instituted, you probably agreed on the compensation. Is that the idea?

The Witness: That is right, sir.

The Court: You agreed on the compensation, so there was no need for a trial fixing the compensation, either by the court or a jury. I may have signed the decree. I don't [714] know. I signed so many.

Mr. Shryock: In any event, your Honor is correct.

The Court: At that time we were rotating in San Diego, and almost any of us could have been there at any time. I just wanted to say that, be-

(Testimony of David W. Agnew.)

cause throughout we have spoken of the purchase of the Santa Margarita Rancho, and I think that is what you mean. Is that it?

Mr. Shryock: Yes, sir. [715]

Mr. Shryock: Yes.

The Court: All right.

Mr. Dennis: That was my understanding, your Honor. They were talking about the title they acquired through the condemnation action.

The Witness: We stipulated with the owners, sir, as to the consideration.

The Court: All right. I think that map is like a summary made from books and I think it would be very valuable to have a graphic showing.

Mr. Shryock: If the court please——

The Court: Do you want to explain any others?

Mr. Shryock: I should like at this time to offer this map in evidence as Plaintiff's Exhibit 43.

The Court: All right, it may be received.

(The document referred to was marked Plaintiff's Exhibit 43 and received in evidence.)

Q. (By Mr. Shryock): Do you want to add anything?

A. This area is the Naval Ammunition Depot and is outlined in yellow. That was acquired in the first condemnation.

The second proceeding, United States versus approximately 122,000 acres was instituted and this area which is outlined in red was acquired in that proceeding.

(Testimony of David W. Agnew.)

The Court: I see. [716]

The Witness: The small area up here is the 112 acres I mentioned, which was acquired by deed.

The green area, 1,676.58 acres was acquired by condemnation proceeding, Civil-321 S.D., while the orange area which comprises 1,574.61 acres was acquired for use by the Navy from the Department of the Interior. It was public domain land and was transferred to the Navy under Public Land Order No. 293.

The Court: All right.

Q. (By Mr. Shryock): Now, Mr. Agnew, will you state whether or not the area in yellow which purports to represent the Naval Ammunition Depot acquisition has as its boundary at any point the Santa Margarita River?

A. Yes, the northwesterly—the northerly boundary—the northwesterly boundary of it.

Q. Now will you state whether or not the area in pink, the 122,000-odd acres acquisition has flowing through it the Santa Margarita River?

A. It does.

Q. At what geographical portion of the area?

A. The Santa Margarita River enters the area at the northeasterly corner of Camp Pendleton and——

Q. That is the lower right-hand corner of the map, is it not? A. That is right. [717]

Q. And from there where does it proceed?

A. It flows or it meets the boundary of the Naval Ammunition Depot.

(Testimony of David W. Agnew.)

Q. To the south?

A. To the south. And forms the boundary between the Naval Ammunition Depot property and the Camp Pendleton property and continues to flow in a southwesterly direction along the boundary of the Naval Ammunition Depot and then into Camp Pendleton and from there on through the camp into the Pacific Ocean.

Q. And from the point at which it leaves the boundary of the Naval Ammunition Depot does it not then embrace the river on each bank?

A. Camp Pendleton does embrace the river on each bank.

Q. Until it reaches the ocean?

A. Until it reaches the ocean.

Q. Where I have used the word "pink" I note that the legend uses "red."

The Court: All right.

Q. (By Mr. Shryock): Mr. Agnew, I direct your attention to the fact that on page 5 of the stipulated judgment, which was a part of that section of the—I beg pardon, of the pretrial order, which was that part of the pretrial order headed "Agreed Facts." There appears this sentence at line 16: "For the full 21 miles the course of the [718] river lies entirely within the property of the United States of America."

And following that sentence there is a foot-note which refers to Exhibit 2, the large map to which we have frequently referred, and following the foot-note there is an asterisk. At the bottom of the

(Testimony of David W. Agnew.)

page following an asterisk is this sentence: "Except for such properties and lands as the Atchison, Topeka and Santa Fe Railroad Company may own."

Have you examined the question of the rights which the Santa Fe Railroad may have with respect to the property so acquired? A. Yes, sir.

Q. And will you describe what you have found with respect to that question and describe the physical relationship of the railroad to the property?

A. I believe that for convenience it would be easiest to discuss that portion of the Santa Fe Railroad which extends parallel to the coast from a point in the southeasterly boundary of Camp Pendleton and then runs in a general northerly direction to the northerly boundary of Camp Pendleton where it enters Orange County.

Q. Is that what we might call the main line of the Santa Fe between San Diego and Los Angeles?

A. That is right, sir.

Q. Now, does it cross the Santa Margarita River? A. Yes, sir.

Q. And is there any structure at the point at which it crosses?

A. There is a bridge across the Santa Margarita River where the Santa Fe Railroad crosses that river.

Q. How many tracks?

A. It is a single track, sir.

Q. On the bridge? A. Single track.

Q. Now, have you had occasion to examine any

(Testimony of David W. Agnew.)

muniments of title relating to the rights of the railroad? A. Yes.

Q. As respects this property?

A. I have.

Q. Will you describe the nature of those documents?

A. Insofar as the main line of the railroad is concerned, I did not think it was important whether the Santa Fe Railroad acquired either a fee or an easement since the river flows under the tracks at the bridge and the land between the railroad tracks and the ocean front abutting on that river would be considered to be riparian.

However, I have certified copies of the deeds executed by the then owners of the Rancho Santa Margarita to the Southern [720] Railroad, which was the predecessor to the Atchison, Topeka and Santa Fe.

These instruments were executed as early as 1884.

Q. Now, do they have reference to this main line which you have been describing?

A. They do not refer to it as the main line. They, however, identify it with respect to the general course of the railroad.

Q. How much land is involved in the property of which you are speaking?

A. The acreage is not recited.

Q. Well, is it——

A. It is a 100-foot right-of-way. At points it varies a little bit.

Q. Have you examined into the question, how-

(Testimony of David W. Agnew.)

ever, as to whether it is in your opinion a fee or an easement.

A. In my mind it is an easement.

Q. And does that apply to the 100-foot strip which underlies the main line of the railroad from the north to the south boundaries of the camp?

A. Yes, except for small parcels of land which in my opinion were conveyed in fee to the railroad company, but all of those lie outside of the watershed of the Santa Margarita River.

Q. And is there any other portion of the physical [721] construction of the railroad on the Camp Pendleton property?

A. There is; a branch line extending from what is usually described as Fallbrook Junction. It runs up through the camp, through the Naval Ammunition Depot and over to Fallbrook.

Q. And emerges from the Camp Pendleton Naval Ammunition Depot boundary at the lower right-hand corner of the map, from the yellow area, Plaintiff's Exhibit 43?

A. Where did you say, Commander?

Q. At the lower right-hand corner of the map from the yellow area it is depicted as emerging from the United States property, is it not?

A. I would say about the center.

Q. But it is the lower right-hand corner of the map? A. Of the map, that is right.

Q. Now, Mr. Agnew, what conclusions have you reached as to the nature of the ownership of the

(Testimony of David W. Agnew.)

railroad with respect to the spur you have just described?

A. In my opinion that is an easement.

Q. That is substantially within the watershed of the Santa Margarita River, is it not?

A. Yes, sir.

Q. Now, Mr. Agnew, again directing your attention to Exhibit 43, is there a line across approximately the middle of the map in brown which appears to separate the northerly [722] portion of the 122,000 acre tract from the southerly portion?

A. There is.

Q. Will you describe what that is intended to portray?

A. On December 16, 1941, the then owners of the property which now comprises the Nava' Ammunition Depot and Camp Pendleton, executed three deeds conveying the property now comprising the military reservation, to two groups of people.

The deed dated December 16, 1941, conveying what is now the Naval Ammunition Depot property named as the grantees the Floods, the Baumgartners and the Union Trust Company, I believe is the third grantee.

Each of the Floods obtained an undivided one-half interest as tenants in common.

The Baumgartners an undivided one-quarter interest as tenants in common and the trust company the remaining undivided one-quarter interest.

Q. As trustee?

(Testimony of David W. Agnew.)

A. That is right. That instrument covered only the property now comprising the Naval Ammunition Depot.

Q. The approximately 9,000 acres?

A. That is right. The second instrument named as the grantees and is dated December 16, 1941, the Flood interests and conveyed to the Floods the area which is southerly of the line extending through the property from the Pacific Ocean to the northerly boundary or the northeasterly [723] boundary of the camp which is now the camp area.

Q. And is that the brown line to which I previously referred? A. That is right.

Q. Approximately how many acres were involved in that southeasterly portion?

A. I think that comprised approximately 70,000 acres.

Q. And what was the third deed?

A. The third deed conveyed to the Baumgartners the area lying northerly of the brown line you referred to, and which is shown on this map.

Q. And that contained approximately how many acres? A. 50,000.

Q. Now referring to that last area of approximately 50,000 acres north of the line in brown on Plaintiff's Exhibit 43, can you state, Mr. Agnew, with reference to this map or to any of the other maps which have been introduced in evidence in this proceeding, whether any portion of this lies in or even close to the watershed of the Santa Margarita River?

(Testimony of David W. Agnew.)

A. It lies outside of the watershed of the Santa Margarita River.

Q. In its entirety?

A. In its entirety. That is the area conveyed to the Baumgartners by the deed of December 16, 1941, the third deed I made reference to. [724]

Q. Is there anything you would care to add with respect to the title of the United States regarding these properties?

A. Well, in order to identify the brown line we referred to, so it can be located on other maps, it follows generally the line of the Horno Canyon.

Q. Does it show south of it, that is to say, out of the northerly tract and in the southerly tract, certain canyons which have been on other exhibits, clearly depicted as being outside of the watershed of the Santa Margarita River?

A. Yes, sir. It discloses Los Pulgas Creek, also Aliso Creek, lying generally southerly of the line we referred to as being indicated in brown on this map.

Mr. Shryock: Now, at this point I should like to make a very brief statement to explain why we have been eliciting what may seem to be somewhat obscure testimony, namely, to establish the fact that if what is bothering the defendants is the fact that there were two deeds for the 122,000-acre tract rather than one deed, and hence that there might have been some severance, that, nevertheless, if there were a severance, which we by no means concede, it was entirely outside of the watershed and

(Testimony of David W. Agnew.)

could not have the slightest legal effect upon the large part containing the approximately 70,000 acres. [725]

The Court: All right.

Mr. Shryock: You may cross examine.

Cross Examination

Q. (By Mr. Dennis): Mr. Agnew, as I understand this portion of Exhibit—43, is it?

A. Yes.

Q. —43, which is outlined in yellow, abuts upon the Santa Margarita River on approximately the northwest corner of what is shown as Section 28, and follows northerly along to a point where there is a figure “14” just above the curve.

A. That is right. It passes through Section 28, Section 21, Section 15, and part of Section 14—

Q. And that is that portion—

A. Just a minute, please. That is in Township 9 South, Range 4 West.

Q. And that is that portion of the stream bed of the Santa Margarita River through which I believe your witnesses have heretofore testified the Santa Margarita was entirely surface stream, or practically surface stream at that point?

A. That is the way I understand it.

Q. And at that point practically all of the flow of the stream would be that which would be recorded at the Fallbrook gauging station, practically so?

A. That is the way I recall it, except for certain

(Testimony of David W. Agnew.)

[726] minor amounts of water which may flow below the veneer on top of it.

Q. Now, are you familiar with the descriptions which were used when you acquired these properties? A. Yes.

Q. Are portions of the Naval Ammunition Depot what we call sectionized property, as distinguished from that portion of the property which was included in these old boundaries of the original grant? A. Part of it is sectionized, yes.

Q. Do you know which part of it is sectionized property?

A. According to this map, the entire area was sectionized. It indicates that the records show it is sectionized property.

Q. This is the map through which the lines—you recall our original Spanish grants were not sectionized? A. Yes.

Q. Is it not a fact that certain parts of the Naval Ammunition Depot were acquired through patents from the United States Government and were not included within the exterior boundaries of the original Santa Margarita grant?

A. Would you repeat that question, please?

Q. I say, it is true, is it not, that certain portions of the United States Naval Ammunition Depot were not [727] included within the exterior boundaries of the original Santa Margarita grant?

A. Not to my knowledge.

Q. In other words, so far as you know, there is no sectionized property which was acquired by

(Testimony of David W. Agnew.)

patent by the United States within that area, as distinguished from the decree confirming the old Spanish grant?

A. The small area lying out here possibly was acquired through patent from the United States. Now, when I say "through patent," I do not have reference to the patent issued by the United States to Pio Pico and Andreas Pico, dated April 8, 1879.

Q. Now, have you made any attempt to run a chain of title on this property, that is, an examination of the instrument when the property was first conveyed by the sovereign power to the individual? A. Yes.

Q. You have done that? A. Yes.

Q. Is the deed to which you referred as conveying a right of way which is now occupied by the Atchison, Topeka & Santa Fe Railway as a spur line the original deed wherein that right of way was created, or is that the deed where there was an exchange of documents after the line had been first constructed? [728]

A. When the line was first constructed, it ran up and followed the river and extended up through what is now called Railroad Canyon. I examined the deed through which the interest in the property covering that right of way was conveyed to the California Southern Railroad Company. That part of the railroad was washed out, I understand, in a flood and was not rebuilt. Thereafter, the Railroad Company conveyed to the then owners of the property whatever interest it had in the right of

(Testimony of David W. Agnew.)

way, the original right of way, that is, back to the owners of the property, who at a later date conveyed an easement to the Railroad Company for a right of way for a railroad as it is now constructed through the property.

Neither of the two deeds I just mentioned affected that part of the right of way which takes off from the main line and runs into what is now Camp Pendleton.

Mr. Dennis: That is all.

Mr. Shryock: Mr. Grover?

Mr. Grover: No questions.

Mr. Shryock: Thank you, Mr. Agnew.

(Witness excused.)

The Court: All right.

Mr. Shryock: If the court please, pursuant to a request made by Mr. Dennis on the second day of this trial, and pursuant to your Honor's direction, we have asked Mr. [729] Hall to return and to explain whether or not he has been able to obtain certain data requested by Mr. Dennis. For convenience, may I say that that appears at page 185 of the record.

Mr. Hall, will you please resume the witness stand.

H. M. HALL

recalled as a witness on behalf of the plaintiff, having been previously duly sworn, testified further as follows:

Direct Examination—(Continued)

The Clerk: It is H. M. Hall, is it not?

(Testimony of H. M. Hall.)

The Witness: Yes.

Q. (By Mr. Shryock): You realize, Mr. Hall, that are you still under oath? A. Yes, I do.

Q. I believe, Mr. Hall, that you were requested to get certain data for the years 1951 and 1952, respecting two specific wells on the Vail property, the so-called J.K. well and the Cantarini well. Will you explain what you did pursuant to that request?

A. I obtained the data as required for the J.K. pump, but the data was not available for the Cantarini pump, because of the nature of the well, and the fact that the pump completely fills the casing and there is no vacuum gauge installed for measuring the distance to the water. I, therefore, included in my work the same data for No. 30 pump, [730] which is in the central part of the valley, and for the Windmill well, which was the key well of the stipulated judgment. [731]

Q. In other words, because of your inability to get the data as to the Cantarini well you then obtained data from a representative additional well? A. Yes.

Q. Did you prepare any figures in connection with your study? A. I did.

Q. I now hand to Mr. Dennis and Mr. Grover copies of the figures which Mr. Hall prepared and I shall turn the witness over to Mr. Dennis for eliciting such information as he may wish.

Cross Examination

Q. (By Mr. Dennis): I wonder, Mr. Hall, if

(Testimony of H. M. Hall.)

you could locate those two wells on Plaintiff's Exhibit 32. I have it over here on the desk.

A. At the upper end of the valley I placed on this map previously a red triangle around a circle marked W.M., which is the Windmill Well in the tabulation.

Q. Is that an artesian well?

A. Nearly all wells in that area are artesian in the sense that the water plane rises somewhat when released but artesian wells doesn't mean that they flow. That well does occasionally flow but at very infrequent intervals.

Q. Would you locate Well No. 30? [732]

A. No. 30 is one of our main pumping wells which is near reservoir No. 3 in the central part of the main Pauba valley and is so designated on the map.

Q. Now, Mr. Hall, as I recall your testimony when you were on the stand before you stated that those wells which had a square were artesian wells and the ones with a circle were wells which were surface wells?

A. Yes, that is approximately true but——

Q. And perhaps I was mistaken but I was under the impression that the artesian wells were those wells which were drilled into the deep strata.

A. That is correct.

Q. Would that be true of the Windmill Well?

A. Yes.

Q. And these figures which are on the sheet of

(Testimony of H. M. Hall.)

paper which was handed to me by counsel for plaintiff are correct?

A. Yes.

Mr. Dennis: I think that is all.

Mr. Shryock: Mr. Grover?

Mr. Grover: Nothing.

Mr. Shryock: Thank you very much, Mr. Hall, and now, sir, the United States rests upon its case in chief as it relates to the defendant Santa Margarita Mutual Water Company and the defendant in intervention the State of California.

The Court: All right. [733]

Mr. Shryock: May I venture to express the gratitude of all of us for your Honor having been so considerate of the convenience of counsel and witnesses in this case?

The Court: All right.

Mr. Dennis: If your Honor please, I believe that in going over the transcript yesterday, that on page 594 at line 15, counsel's question in the transcript states 1,500 acres of Camp Pendleton leased out. I believe you meant 5,500 acres, did you not? I think that is what you said.

Mr. Shryock: Is that Mr. Taylor's testimony?

Mr. Dennis: Yes, and I think the record should probably be corrected.

Mr. Shryock: I believe that Mr. Dennis is correct, your Honor. I am certain that the figure was 5,500.

Mr. Grover: Your Honor, may I ask if this was introduced as an exhibit by number?

Mr. Shryock: It certainly was not by the plaintiff.

Mr. Grover: Is it going to be introduced?

The Court: Which is that?

Mr. Grover: This listing of Mr. Hall.

The Court: Well, he turned them over to you. If you want to introduce them you may.

Mr. Shryock: Mr. Dennis can do what he wants with them.

Mr. Grover: I just wanted to clarify that point. And was this map introduced by the plaintiff?

Mr. Shryock: That is Plaintiff's Exhibit 43.

The Court: The compilation of the wells was merely handed to you. If you want it in as an exhibit at the present time you may offer it.

Mr. Dennis: It is my understanding if I want to have it as an exhibit it will be necessary for me to put it in the record.

The Court: That is right.

Mr. Dennis: I don't know as yet until I have had a chance to study it whether it is going to be important or not.

The Court: All right, gentlemen.

Mr. Dennis: One other thing which I would like to ask the court at this time.

Under the terms of the pretrial order I was to supply the plaintiffs with copies of the Santa Margarita applications.

I supplied some photostatic copies and I was told that they wanted certified copies and Mr. Grover ordered them from the Division of Water Resources. When they came, however, I find that

they were photostatic copies of the Fallbrook Public Utility application in which I am not interested.

I don't know who is going to pay the bill to the blueprinting company, the state or myself.

In the meantime all of the records which the Division of Water Resources had, at my request on the Vail applications, the Fallbrook Public Utility District application and the [735] Government application and the Santa Margarita Mutual Water Company's applications were forwarded to Los Angeles.

However, at the time they were forwarded the instructions said that if any copies were to be made they were to be returned to Sacramento and the copies be made in Sacramento and the copies could not be made in Los Angeles.

It is the desire of the parties, I believe, at least the defendants, that the record of the Division of Water Resources be held in Los Angeles pending the trial of this action.

The Court: They haven't been turned over to us or to the clerk. When they are turned over to us I will make an order but we don't have them now.

Mr. Dennis: I am in this position, your Honor. I can get uncertified copies of the documents which I should have given to the Government. I am not in position to get them until they are returned.

I am wondering if they will accept copies that are uncertified from the Division of Water Resources.

Mr. Shryock: If they will be verbally certified

by Mr. Dennis we shall be happy to accept them.

The Court: All right.

Mr. Dennis: That brings me up to this. When we convene again I imagine we will go on with the case as far as the Santa Margarita Mutual Water Company is concerned and there is one question which bothers me considerably and that [736] is—it is my position that such rights as we may have to utilize and extract the waters of the Santa Margarita River will be such as may be granted under and pursuant to any permit which is issued by the Division of Water Resources of the State of California. They may in turn see fit not to issue such a permit. Our rights may be restricted under the terms of that permit.

It is my view of this case that it is not incumbent upon the defendant to establish whether or not the lands lying within the service area of the company and described in the applications are susceptible of profitable irrigation.

It seems to me that all this court is going to be called upon to decide is whether or not there are surplus waters, either temporarily or permanently, which are subject to appropriation, the extent of the riparian and the prescriptive rights of the United States Government and the relative priorities of the various applications to appropriate waters filed with the Division of Water Resources.

Naturally if at any time we are not putting the waters of the Santa Margarita River to beneficial use under such permit as might be issued to us by the State of California, they are then surplus

waters and any other appropriator or riparian owner has the use to such waters. However, if I am going to be required to prove the nature of the land lying within the service area and within the area for which the [737] water was appropriated it means that I am going to have additional witnesses and I would like to have some expression on that point at this time so that I can go ahead.

The Court: I will hear what Commander Shryock has to say. I have my own ideas on it but before I express them let us see what he has to say.

Mr. Shryock: I would prefer not to comment on that aspect of the case.

I believe that Mr. Dennis should determine what he requires to present his case.

The Court: All right. In view of that statement I will say this, that if the water is put to use, and as I read the cases, so far as an applicant who has not been granted a permit as yet, the only benefit that could be derived from a showing of adaptability of lands for a certain purpose would be in case there was a proportionment.

And appropriator has no correlative right as a riparian owner has and it would seem to me that in the condition in which your rights are that it isn't necessary for a determination of this lawsuit to determine what, if any, use you are going to put the water to as and when you get it.

Mr. Dennis: That is my position, your Honor, and further than that I think that that is a matter to be decided by the Division of Water Resources under the administrative provisions of the Code as

to whether or not our lands are [738] susceptible of irrigation. That is one of the things we are going to have to prove.

The Court: I think this. I don't want to give an opinion on an abstract question, but if there is a surplus, either temporary or permanent, it is no concern of ours who gets the surplus.

The Government has no interest in who gets the surplus if there is a surplus to which the Government is not entitled. It goes back to the sum total of the corpus of the water resources of the state, subject to be appropriated by others. So, I cannot see how the adaptability of your land for one purpose or another is material. And while I don't want to commit myself as to Fallbrook, because they are not represented here, either in person or by observers, I doubt if that would be an issue as to them and I certainly am not going to allow that inquiry unless I am convinced it has any bearing because the main point is this. They actually are diverting the water. They either have a right to divert it or they don't have such a right. If they have a right to divert it and put it to beneficial use it is no concern of ours.

Mr. Dennis: Just this one thought.

The Court: Except as to their riparian lands. I didn't think they had so much but you called my attention to it. My attention was called to it in the argument and the discussion in San Diego. You will notice when the opinion was [739] completed that I mentioned 400 acres with possible riparian rights. As to those a question of use might arise but again

as to those I don't think it is of great importance.

However, if this is an apportionment as between riparians I think it would be material whether it is actually being put to use because otherwise if it is not being put to use it is a part of the river and, of course, a riparian owner may use more than his share if the other riparians don't put it to beneficial use.

The Constitution modifies the famous or, rather, infamous case of *Hemminghouse* which held that even waste water you have a right to if they flow in front of you. I don't know who invented the simile. I think it was Judge Schenck in his dissent or maybe I did, but it is sometimes called the "rockingchair theory of riparian rights." They have a right to sit on the bank of the river and watch the river go by whether they use it for beneficial purposes or not.

Mr. Dennis: That is the *Hemminghouse* case?

The Court: Yes.

Mr. Dennis: I do think that your Honor is going to have to determine in this case what constitutes surplus waters.

The Court: That is right.

Mr. Dennis: And whether there are surplus waters and [740] if there are I think then you are going to have to determine as among the appropriators who have priority to those surplus waters.

The Court: That is right, but the use to which they put it is no concern of ours and cannot be covered by a decree.

Mr. Dennis: That is my understanding. I just wanted some verification.

The Court: That is my view of the law. And assuming that in the case of the Fallbrook Utility District, who are diverting water, the use to which they put it might become material but I don't think it will. It certainly is not as to you. You are not diverting any water. You have a paper right. I don't say that disparagingly.

The Government in this case is not going to claim anything by virtue of their appropriation. It wouldn't be much good to decide what would happen if your application is turned down. We will take that up when and if it happens.

Mr. Dennis: We felt we would be very foolish, your Honor, to spend a great deal of money to develop water and find we had no rights in the river. We feel they should remain simply paper rights until we have a decision.

There is one other thought which I wanted to express and get some opinion from counsel for the plaintiff on. The State of California has from time to time published rules and regulations and information pertaining to the appropriation [741] of water in California in which they set forth the allowances for domestic uses—what they consider to be a reasonable use.

Now if necessary we can bring Mr. Sandor or the other man who made the studies to determine what is a reasonable domestic use per gallon per day per person. However, we can save considerable time, I think, if we could enter into a stipulation

with the plaintiff that if Mr. Sandor was called he would say that this table, which is set forth on page 25, is correct to the best of his ability.

Mr. Shryock: May I inquire as to the nature of the publication to which you refer?

The Court: It is issued by the State of California. It is a state publication.

Mr. Shryock: If you are asking us whether we will agree that you may use that as a state publication, why, of course we will.

Mr. Dennis: Thank you.

The Court: As a matter of fact, Col. Robertson said that he was familiar with those standards.

Mr. Dennis: I believe he said he was not.

Mr. Shryock: Oh, to the contrary. I believe his Honor's recollection is correct. He stated he was familiar with them.

The Court: And also familiar with the other literature [742] on the subject, but he gave his own view that you cannot apply a general rule to a military establishment, for various reasons. He said some people don't wash at all, some people wash more often than others and it should be on the basis of a specialized development—I think he said like a high-class suburb.

Mr. Dennis: I apologize. I was mistaken. I understood Col. Robertson to say that—

The Court: Many a time the man who actually asks the questions does not get so vivid an impression of the testimony as the judge who just listens.

Mr. Dennis: Perhaps I would have asked some

other questions, and maybe Col. Robertson would have answered in the affirmative.

The Court: All right. Then it means you won't have to bring him back, and the stipulation may be formulated more definitely at the time you get ready to introduce your evidence.

Mr. Dennis: And I believe Mr. Henderson wants to furnish us with some information, too, and I believe that will be forthcoming.

The Court: That is right. That will be forthcoming, and if it is of a type that calls for explanation, he will be made available to you for that purpose, and you may call it additional cross examination, or whatever you want to call it in the record. This isn't the type of case in which that becomes important, because this is not a case where you will make a motion for a nonsuit, because a nonsuit does not lie. So it makes no difference if you close the case, because we can open it for any purpose necessary.

Mr. Dennis: Yes.

Mr. Shryock: If the Court please, one minor matter. May the record show that Mr. Swing is receiving a copy of the daily transcript, and will your Honor accept that statement, or must we swear Mrs. Zellner?

The Court: I don't think it is necessary. I understand [744] he is getting it.

Mr. Shryock: Is that correct, Mrs. Zellner?

The Reporter: That is right.

The Court: That does not become material at the present time. It may become material later on. It all

depends. I haven't told you, but I think of mechanics long in advance, and if, as and when Mr. Swing gets back into the case, and he will get back into the case at some stage, I will have certain suggestions to make in the interests of the economy of time, which I will not make at the present time, and in view of these undisclosed intentions of mine, the fact that he has a transcript may have some bearing on the matter. He has been receiving it right along.

Mr. Dennis: Commander, could we have a stipulation or agreement, too, that the table No. 6, consisting of seven sheets, which is entitled, "Well Drawdown and Static Level Data," which was supplied in answer to the demand in written interrogatories of the Santa Margarita Mutual Water Company, contains all of the information relative to drawdown and static water levels in the wells located in Chappo, Ysidora, and O'Neill Basin, of which you have any knowledge, and which are in the possession of the Office of Ground Water Resources, Post Maintenance or Public Works.

Mr. Shryock: The plaintiff so stipulates.

Mr. Dennis: All right. [745]

Mr. Shryock: Your Honor, may I ask something off the record?

The Court: Yes.

(Discussion off the record.)

The Court: All right, gentlemen, then the case will recess until Tuesday, November 18th, at 10:00 o'clock.

Thank you very much, gentlemen, for the manner and the temper in which you are conducting this

lawsuit. I said I hoped it would turn into a friendly lawsuit, and I think it has.

(Whereupon, at 12:30 o'clock p.m. an adjournment was taken until 10.00 o'clock a.m., Tuesday, November 18, 1952.) [746]

November 18, 1952, 10:00 o'clock a.m.

The Court: Cause on trial.

Mr. Shryock: If your Honor please, Mr. Dennis has very kindly consented that I might make a few clarifying observations.

The Court: All right.

Mr. Shryock: In the first place, on page 574 of volume 5 of the record reference is made to certain information which Mr. Henderson was to submit as supplementary information to Exhibit 42. Your Honor's first suggestion, that he compile it from his records in Portland, Oregon, and then permit us to submit it to Mr. Dennis, has been followed, and I now hand Mr. Dennis and Mr. Grover the information that Mr. Henderson undertook to obtain.

Secondly, if the Court please, I have been under the impression that Exhibit 14, which was the voluminous copy of the records of the United States Geological Survey runoffs at the various gauging stations, had contained a summary. We found later, however, that there were no summaries by years for those gauging stations.

We have, therefore, caused to be compiled the records by years from 1923-1924 down through the water year 1951-1952, showing the runoffs of the United States Geological Survey records at the six

gauging stations that have been [749] involved in this record. I have furnished copies of those to Mr. Dennis and Mr. Grover, and I should like very much to offer them in evidence as Plaintiff's Exhibit No. 44.

The Court: As a summary.

Mr. Shryock: As a summary, sir, of our Exhibit No. 14.

The Court: All right.

Mr. Dennis: I have no objection, your Honor. Your Honor, I think, further, could we have a stipulation that the amounts shown in the U.S.G.S. survey show the actual amounts of water that went past those stations, if those are the correct readings?

Mr. Shryock: I think that is what they purport to show.

(The documents referred to, marked Plaintiff's Exhibit No. 44, were received in evidence.)

Mr. Shryock: And, finally, if the Court please, since there is nothing in the record about it, I should like to make a brief statement, that following the hearing in San Diego on October 17th, at which the matter of access of the defendants' experts to the Camp Pendleton property was gone into some detail, I had a conference the next morning with General Smith, as a result of which he provided that the fullest access should be yielded to the defendants and their experts.

The following Monday I so notified counsel for the two defendants in the separate trial and the intervening defendant, [750] and pursuant to those notifications arrangements were made for the ex-

perts to visit the property, and they did, in fact, visit the property and were given what I believe was the fullest possible access.

The Court: All right.

Mr. Shryock: Thank you.

Mr. Dennis: Since that time, your Honor, no access has been denied the Santa Margarita Mutual Water Company's experts. However, as I understand, Mr. Caldwell today is attempting to get certain further information.

The Court: All right, gentlemen. As I understand now, you rest—the Government rests?

Mr. Shryock: Yes, sir.

The Court: Then Mr. Dennis will take up the laboring oar. [751]

* * * * *

ALLEN C. BOWEN

called as a witness by the defendant, having been previously sworn, resumed the stand and testified further as follows:

Direct Examination

Q. (By Mr. Dennis): Major Bowen, calling your attention to the map which is on the plywood sheet here, which was furnished the Santa Margarita Mutual Water Company in response to its demand for written interrogatories, is that a map which was furnished as map No. 1? [785]

A. It is.

Q. And that was prepared in the office of the Ground Water Resources under your supervision?

A. That is correct.

(Testimony of Allen C. Bowen.)

Q. Which would—I would now like to offer this map into evidence as Defendants' Exhibit A.

Mr. Shryock: No objection.

The Court: It may be received.

(The document referred to was marked Defendants' Exhibit A and received in evidence.)

Q. (By Mr. Dennis): Now, I believe, Major, that the various legends which are on this map are correct and that the legend in the left-hand corner designates the wells which are used for irrigation or camp supply, the unused domestic or stock wells and the wells which have been destroyed and which are located in the various basins and watersheds of the ranch as shown on the map, is that correct?

A. The legend on the map as placed there is correct.

Q. And I believe that the location of the military installations are more or less correctly shown on the map?

A. Up to the date of the compilation of the map they are correct.

Q. Now, Major, calling your attention to Plaintiff's Exhibit 22, a sheet which is designated Las Pulgas Canyon, I notice that bears in the right-hand corner, lower right-hand corner "restricted—Security information." Does that [786] mean this is a map which is not available generally to the public?

A. That is correct. It is available for military use only.

(Testimony of Allen C. Bowen.)

Q. And I notice that on this map there are various circles which have been colored solid in black and other circles which designate the location of the wells.

A. That is correct.

Q. And that there is a broken line which designates the location of the pipelines.

A. Standard pipe symbol to indicate the location of pipelines as constructed.

Q. And I notice that in the square or grid, which is numbered 6189 there is a shaded area.

A. That shaded area is included partly in grid 6189, 6190.

Q. And that portion of the shaded area which is shaded with horizontal lines indicate that that is construction which will commence in 1953?

A. I will have to refer to the legend on that. Your question referred to that cross-hatch in horizontal?

Q. Horizontal lines.

A. It is indicated on the legend "proposed construction in 1953."

Q. And that construction has not started yet, so far [787] as you know?

A. I am not certain as to whether that construction has been started yet or not because I am not familiar with the budget. There is a portion of that immediately adjoining which is cross-hatched in slant lines which indicates proposed construction in 1952.

Lt. Col. Robertson would be more qualified to

(Testimony of Allen C. Bowen.)

testify as to the phase of construction in which that area is presently engaged.

Q. Do you know of your own knowledge whether any men are stationed in that area at the present time?

A. In the area under construction, which is cross-hatched, no men are stationed because the construction is not completed.

Q. Now, Major, calling your attention to the sheet entitled "San Clemente Sheet," in Plaintiff's Exhibit 22, we find a similar shaded area in grids 5593, 5693, 5692, 5592, 5493.

A. Correct. [788]

Q. The testimony as to that location would be the same as it was to the property located in Las Pulgas Canyon? A. Yes.

Mr. Shryock: Let's have one thing clear here. When you say "stationed," Mr. Dennis, do you mean billeted?

Mr. Dennis: Billeted.

Mr. Shryock: Very well.

Q. (By Mr. Dennis): Now, I also find a similar shaded area in 4798, 4898, 4998, 4997, and 4897. To your knowledge, are there any men billeted in that area at the present time?

A. To my knowledge, there are none.

Q. Now, I believe that the areas as to which we have just referred lie or are situated in Las Pulgas Canyon, in San Mateo Canyon, and in Horno Canyon; is that correct?

A. No, that is not correct. The one to which we

(Testimony of Allen C. Bowen.)

first referred, on the Las Pulgas Canyon sheet, is in fact located in Las Pulgas Canyon. The one to which we referred secondly, located in grid square 5593, and adjacent grid squares, entitled "Camp Horno," is in fact located on the south fork of the San Onofre basin, and the one that we alluded to last, located in grid square 4898 and surrounding grid squares, is located adjacent to San Mateo Canyon, or within, I should say lying within San Mateo Canyon.

Q. Does San Mateo Canyon constitute a portion of the watershed of the Santa Margarita River?

A. It does not.

Q. Does Las Pulgas Canyon constitute a portion of the watershed of the Santa Margarita River?

A. It does not.

Q. Does San Onofre Canyon constitute a portion of the watershed of the Santa Margarita River?

A. It does not.

Q. Now, Major, calling your attention to Fallbrook sheet of Exhibit 22, we find a shaded area, shaded partially with horizontal lines and slant lines, lying in grids 6190, 6290, 6189, and 6289; does that lie in Las Pulgas Canyon? A. It does.

Q. Is that the same area which was referred to on the sheet entitled "Las Pulgas Canyon?"

A. That is the same area.

Q. Now, in grid squares 6584, 6585, 6685, there is a shaded area. Does that shaded area appear on either the Las Pulgas Canyon sheet or the San Clemente sheet?

(Testimony of Allen C. Bowen.)

A. That shaded area, marked "Camp Margarita," does not appear on either the San Clemente sheet, nor does it appear on the Las Pulgas Canyon sheet.

Q. Are any of the billets completed in that area?

A. To the best of my knowledge, they are not.

Q. Does that area lie within the Santa Margarita watershed? [790]

A. It does.

Q. Now, we find a square with slant lines in grid 7187—

Mr. Shryock: Of what sheet?

Q. (By Mr. Dennis): —of the Fallbrook sheet. Is that project now under construction?

A. That project is known as the Wherry housing site, and it is now under construction.

Q. And that is located within the watershed of the Santa Margarita River?

A. It is located within the watershed of the Santa Margarita River.

Q. Then, Major, you called my attention to the fact that I neglected to call your attention to a project which is in a square with slant lines, in grid square 6783. Is that project now under construction?

A. It has been about completed.

Q. Have any men been stationed or billeted there?

A. Yes, there are men presently being assigned to billets in that area.

Q. When were the first men assigned to that area?

A. I don't know.

(Testimony of Allen C. Bowen.)

Q. In the fall of this year, or, the late summer or fall of this year?

A. I don't know. I would have to check the record in [791] order to see when the first men were assigned to that Chappo Flat Barracks area.

Q. And that lies within the watershed of the Santa Margarita River? A. It does.

Q. Now, Major, I believe that in response to the request for written interrogatories of the Santa Margarita Mutual Water Company, certain tables were prepared which show the use of water by Camp Pendleton, the military installations; is that correct? A. That is right.

Q. Were they prepared under your supervision?

A. They were.

Q. In the Office of Ground Water Resources?

A. That is correct.

Q. Now, calling your attention to table No. 7, I think that is comprised of three sheets, is it not?

A. It is.

Q. I believe that the first sheet shows the monthly water consumption for Camp Joseph H. Pendleton.

A. That is the title of the first sheet of table No. 7.

Q. Now, as I understand, that table shows the total water consumed by months, from the period commencing with January, 1943, and terminating with April of 1942, which was [792] consumed by Camp Pendleton for military, domestic, agricultural, and recreational purposes from the Santa

(Testimony of Allen C. Bowen.)

Margarita River or the Camp Pendleton basin.

A. Would you read back those purposes again, please?

(The portion referred to was read.)

A. I am not certain whether the agricultural use was indicated on this table or not. I would have to check back on the question and the answer, the written answer to the interrogatories, to see what we purported to represent in this tabulation. Many of these tables were prepared with the military use separate from the agricultural use.

Q. Will you do that during the noon recess then, Major? A. I will check that.

Q. Now, calling your attention to sheet 2 of table 7, which says, "Monthly Water Consumption, United States Naval Hospital, Camp Joseph H. Pendleton," was that table prepared also in your office?

A. That table was prepared in the Office of Ground Water Resources, under my direction and supervision.

Q. And that shows the amount of water consumed by the United States Naval Hospital for the period shown? A. That does.

Q. Calling your attention to sheet No. 3 of table No. 7, which is entitled, "Monthly Water Consumption, United States Naval Ammunition Depot, Fallbrook," was that table [793] prepared under your direction?

A. That table was prepared under my direction and supervision.

(Testimony of Allen C. Bowen.)

Q. And it correctly sets forth the amount of water by months consumed by the Naval Ammunition Depot for the periods set forth?

A. That is correct.

Q. Now, Major, calling your attention to table 13, which consists of three sheets, and in particular to sheet one, which is entitled, "Agricultural Use of Water," does that table correctly set forth the amount of water consumed for agricultural purposes, which was extracted from the Santa Margarita River and the Pendleton basin, referring to the Pendleton basin as the three basins which you have referred to heretofore?

A. Table 13, in answer to interrogatories posed by the Santa Margarita Mutual Water Company, sheet 1 of three shows the agricultural use of water, and does represent that amount extracted from the Santa Margarita basin for agricultural use on Camp Joseph H. Pendleton.

Q. And that would be both within and without the watershed?

A. That is correct.

Q. Calling your attention to sheet 2, which is entitled, "Military Use of Water for the Period Commencing [794] with January, 1943, and Terminating May, 1942," does that correctly set forth the water which was used for military uses by Camp Pendleton, that was extracted from the Santa Margarita basin or from the Santa Margarita River?

A. Sheet 2 of three of table No. 13, in answer to interrogatories posed by the Santa Margarita Mutual Water Company, does show the military use

(Testimony of Allen C. Bowen.)

of water for Camp Pendleton, the U. S. Naval Hospital, and the U. S. Naval Ammunition Depot, for the period of January, 1943, to May of 1942.

Q. And that water was all produced or extracted from the Pendleton basin or the Santa Margarita basin?

A. That is correct.

Q. And that represents all of the water which was consumed for military purposes by Camp Pendleton within the——

A. That is all of the water extracted from the Santa Margarita basin for use by these military installations, Camp Pendleton, Naval Hospital, and U. S. Naval Ammunition Depot.

Q. Well, these installations to which this water was supplied, did they have available any other source of water, other than derived from the Santa Margarita watershed?

A. Yes, indeed. Camp Pendleton has available water from several other sources besides the Santa Margarita River.

Q. Now, let's refer to Plaintiff's Exhibit 22, and I [795] will ask you, Major, if any portion of the Camp Pendleton installations situated in areas 25, 12, 14, 11, 24, 13, 15, 17, 16, 23, 22, 21, and 31 were supplied with water from any source other than from that obtained from the watershed of the Santa Margarita River.

A. Well, there was no significant amount of water furnished any of those areas you named, Mr. Dennis. We have some small, what we might call stock water ponds, which do furnish local amounts

(Testimony of Allen C. Bowen.)

of water, but the bulk of the water for those areas was furnished from the Santa Margarita River.

Q. Now, Major, calling your attention to sheet 3 of table No. 13, which is the monthly water consumption for Homoja Housing, does that correctly state the amount of water which was consumed at that housing project?

A. The records as shown on sheet 3 of table No. 13 in answer to interrogatories proposed by the Santa Margarita Water Company does show correctly the monthly water consumption for Homoja Housing.

Q. And that water was all derived from the Santa Margarita watershed?

A. That is correct.

Mr. Dennis: I would like to offer table 13, consisting of two sheets, in evidence as Defendants' Exhibit B.

Mr. Shryock: No objection.

The Witness: Consisting of three sheets.

Mr. Dennis: I beg your pardon, it should be three sheets.

Mr. Shryock: No objection.

The Court: It may be received.

(The documents referred to were marked Defendants' Exhibit B and received in evidence.)

Q. (By Mr. Dennis): Now, calling your attention, Major, to table No. 22, which was explained or strike that. That was supplied in answer to a demand for written interrogatories of the Santa Margarita Mutual Water Company. Was that pre-

(Testimony of Allen C. Bowen.)

pared in your office and under your supervision?

A. It was.

Q. And does it correctly state the amount of water which was used on the golf course at Camp Pendleton?

A. It correctly states the amount of water used on the golf course according to our best estimate.

Mr. Dennis: I would like to offer this in evidence as Defendants' Exhibit C.

Mr. Shryock: No objection.

The Court: It will be received.

(The document referred to was marked Defendants' Exhibit C and received in evidence.)

Q. (By Mr. Dennis): And Major, could you give us the approximate location of the golf course on Defendants' Exhibit A?

A. The golf course on Defendants' Exhibit A, if I may approach the map——

The Court: Certainly.

A. Appears in the bottom of Windmill Canyon. The club house, which would be about midway along the extremities of the golf course, is located on Defendants' Exhibit A in the Northwest Quarter of Section 32, Township 10 South, Range 4 West, San Bernardino base line and meridian.

Q. Windmill Canyon does not constitute a portion of the watershed of the Santa Margarita River?

A. It does not. [798]

Q. You will check at the noon recess the figures on page 1 of table 7?

A. I will be very glad to.

(Testimony of Allen C. Bowen.)

Mr. Shryock: What was that question?

Mr. Dennis: He will check on his figures on page 1 of table 7.

Mr. Shryock: That is the one you asked about before?

Mr. Dennis: That is correct.

Q. (By Mr. Dennis): Now, Major, the area which is known as the Naval Ammunition Depot which is comprised of 9,147 acres, is shown on Defendants' Exhibit A by a dotted line or dashed line above which appears "Naval Reservation." Would you care to inspect the map?

A. The boundary symbol delimiting the use of the Naval Ammunition Depot at Fallbrook as shown on Defendants' Exhibit A, is a dash-dot symbol and in the lower right-hand corner of that reservation appears over the boundaries "Naval Reservation" and within the area it shows—it is written "Fallbrook Naval Reservation."

Q. And, Major, before you leave, a portion of the watershed of the Santa Margarita River embraces 35 and portions of 36 of Township 9 South, Range 4 West, does it not?

A. And referring to the DeLuz watershed as shown on Defendants' Exhibit A, you include those portions of the property which constitute the portion of the Naval Reservation or Camp Pendleton which lie without the exterior boundary lines of the Santa Margarita grant, do you not?

A. Yes. We include all of the acquisitions by the Government for the Camp Pendleton reserva-

(Testimony of Allen C. Bowen.)

tion. However, the boundary line as indicated on Defendants' Exhibit A is not quite correct. It was correct to the best of our information at the time the map was prepared but there are some minor differences which are indicated on Plaintiff's Exhibit No. 22.

Q. Were those questions made on Plaintiff's Exhibit 23 and on Plaintiff's Exhibit 24?

A. May I see the exhibit, please?

The Court: He cannot visualize them, Mr. Dennis. Show them to him.

Q. (By Mr. Dennis): I will hand you my copy of Exhibit 24 and ask you if the watershed boundary as shown on that map includes all of the properties which comprise the United States Naval Ammunition Depot and Camp Joseph H. Pendleton which lie within the watershed of the Santa Margarita River?

A. There again on the northerly boundary the irregular area which was not part of the original Rancho Santa Margarita grant, there are some minor changes which have not been incorporated in this Exhibit No. 24.

Q. Major, calling your attention to Exhibit 23 and Exhibit 24, the watershed of the Santa Margarita River as depicted on those two exhibits, include all the properties [800] owned by the plaintiff including properties which were not a portion of the original Santa Margarita grant?

A. Exhibit 24 was prepared originally by trac-

(Testimony of Allen C. Bowen.)

ing the original of Plaintiff's Exhibit 22 so the boundaries must of necessity coincide.

Q. And they include properties which were not a portion of the original Santa Margarita grant?

A. That is correct.

The Court: Is this a good place to stop, Mr. Dennis?

Mr. Dennis: Yes.

The Court: All right, 2:00 o'clock.

(Whereupon, at 12:10 o'clock p.m. a recess was had until 2:00 o'clock p.m. of the same day.) [801]

November 18, 1952, 2:00 o'clock p.m.

The Court: I am sorry, gentlemen, I was delayed, but, as you know, I have so many administrative details to attend to. I spent practically all day yesterday trying to clean things up, but a lot of things happen when you are away. If you had seen my desk when I got in this morning, you would not realize I had been gone only two working days. It looked as though I had been away for a month, and I haven't been able to dig my way out, although I am beginning to see light. So I had to take this time to do some dictation on a matter I had under submission.

You may proceed.

Mr. Dennis: Major Bowen.

ALLEN C. BOWEN

resumed the stand as a witness on behalf of defendants and, having been previously duly sworn, testified further as follows:

(Testimony of Allen C. Bowen.)

Direct Examination—(Continued)

Q. (By Mr. Dennis): Major, during the noon recess did you have an opportunity to inspect the figures which appear on sheet 1 of table 7, which was given in response to the written interrogatories of the Santa Margarita Mutual Water Company?

A. I did. [802]

Q. And are you prepared to say at this time what the figures represent?

A. The figures on sheet 1 of table No. 7, supplied in answer to interrogatories of the Santa Margarita Mutual Water Company, show the monthly water consumption for Camp Joseph H. Pendleton from the year, January, 1943, until April, 1952, inclusive. That table shows, in response to the interrogatory, all of the use, including agricultural use.

Q. That would be the entire demands of the camp on the Santa Margarita River for that period?

A. That is correct.

Mr. Dennis: I would like to offer in evidence, then, as Defendants' Exhibit D, table 7, consisting of three sheets.

Mr. Shryock: No objection.

The Clerk: Is this admitted, your Honor?

The Court: It may be received.

The Clerk: That is Defendants' Exhibit D in evidence.

(The document referred to, marked Defendants' Exhibit D, was received in evidence.)

Q. (By Mr. Dennis): Now, Major, calling your

(Testimony of Allen C. Bowen.)

attention to table No. 1, which was given in response to the demand for answers to written interrogatories, I notice two figures opposite De Luz Creek and Fallbrook Creek. I believe they represent the number of acres within the watershed of that creek within the boundaries of the Naval Ammunition Depot. [803]

A. The numbers indicated——

Q. I mean Camp Pendleton.

A. The numbers indicated in table No. 1, supplied in answer to interrogatories by the Santa Margarita Mutual Water Company, show the acreage of De Luz Creek and the acreage of Fallbrook Creek which are included within the exterior boundaries of the Naval Reservation.

Q. And could you give me the number of acres within the watershed of Fallbrook Creek?

A. Fallbrook Creek has 3,798.9 acres lying within the Naval Reservation, United States Naval Ammunition Depot, and the Camp Pendleton Reservation.

Q. Could you give me the number of acres lying within the watershed of De Luz Creek?

A. The acreage for De Luz Creek is 6,869.6, all of which lies within the exterior boundaries of Camp Pendleton. [804]

Q. Now, Major, I wish to call your attention to a map which is titled "Land Utilization Map" and ask you if that is a copy of the tracing which you used to reproduce or produce Plaintiff's Exhibit 23, I believe it is—Plaintiff's Exhibit 24?

(Testimony of Allen C. Bowen.)

A. Yes. This is a print from the original tracing introduced into evidence as Plaintiff's Exhibit No. 24.

Q. And since obtaining that from you I have had the acreage, which is shown on that map as irrigated, pasture, colored in green. And the acreage would could be devoted to row crops in brown. The acreage devoted to avocados in blue and the acreage in citrus a green and blue area.

You have had an opportunity to examine the map and would you say that the colorings are substantially correct?

A. With one minor detail which struck my eye at the present moment. The area in the lower left-hand corner of this copy of Exhibit 24 which is colored in as citrus is larger than—correction.

Q. It is substantially correct, is it not?

A. It is substantially correct.

Mr. Dennis: I would like to introduce this map in evidence then as Defendants' Exhibit E.

The Court: It will be received.

(The document referred to was marked Defendants' Exhibit E and received in evidence.)

Mr. Shryock: May I say at this time, just so there is no confusion, that the Defendants' Exhibits A through E so far have no relation to the Defendants' Exhibits as they were recited in the pretrial order.

I say that because there were 35 exhibits recited as being the plaintiff's exhibits in the pretrial order and they in fact are the first 35 exhibits of the

(Testimony of Allen C. Bowen.)

plaintiff. But these lettered exhibits which have been offered today have no relation to those mentioned in the pretrial order.

Mr. Dennis: That is correct, yes.

The Court: All right.

Q. (By Mr. Dennis): Now, Major, calling your attention to Defendants' Exhibit E, as to the properties which lie within the boundaries of the United States Naval Reservation or United States Naval Ammunition Depot, did you anticipate that those properties would obtain water to irrigate the pasture acreage, avocado land and row crop acreage—where did you anticipate that water would come from?

A. I anticipated that the water would be obtained from the Santa Margarita River, those lands lying within the watershed of the Santa Margarita and being riparian thereto.

Q. What portion—where would the point of diversion be, Major?

A. Well, I have not made any detailed investigation as to a diversion point. It would be entirely feasible, however, [806] to construct a diversion in there and lift water to the surface of the—Fallbrook surface upon which those irrigable lands largely lie.

Q. Well, during the summer months when those—when the needs of the land for irrigation would be the greatest that water would have to be extracted from the Pendleton basin, would it not, or Santa Margarita basin?

(Testimony of Allen C. Bowen.)

A. Without any surface storage that would be the only present supply of water.

Q. That is the water cycle or seasonal storage. You would have to divert those waters from the basin?

A. That is correct.

Q. And as to all of the lands which are lying approximately north of the line which represents the southern boundary of the United States Naval Ammunition Depot as extended, would have to be obtained from the same source, would it not?

A. Are you referring to the section line indicated on the map? That would be the bottom section line of the tier of sections lying in Township 10 South?

Q. The northerly tier, yes, in 10 South.

A. And your question was that the irrigable land lying north of that section line?

Q. Would have to obtain their water during the summer months from the Pendleton or Santa Margarita basin?

A. That is right. And the base, of course, projects up [807] into those irrigable lands. In fact it runs on an air line better than three miles north of that line.

Q. Into which lands now?

A. (No answer.)

Q. Which lands?

A. In those irrigable lands north of that section line that was indicated in the previous statement.

Q. Well, now, Major, the limit surface area of the base is correctly shown on Plaintiff's Exhibit A, is it not?

A. (No answer.)

(Testimony of Allen C. Bowen.)

Q. On Defendants' Exhibit A?

A. I believe that that is the area delimited on Defendants' Exhibit A and was for another purpose than showing the area of the underground basin, Plaintiff's Exhibit No. 10, a map showing the lower Santa Margarita River Valley prepared by the U.S.G.S. which delimits the surface area of the underground basin lying within the camp.

Q. Now, Major, calling your attention to Plaintiff's Exhibit No. 10, the portion of the basin to which you alluded is this narrow strip of land which starts approximately even with the northerly end of Lake O'Neill and extends approximately a mile northerly to a point signified as the De Luz Dam site?

A. Your original question was with reference to this line marking the southern boundary of the northerly tier of sections in Township 10 South, and I stated that the underground basin ran approximately three miles north of that line. Mr. Worts in his testimony indicated that for practical purposes, or for purposes of operating the basin, they had arbitrarily drawn the upper limit of the basin, or the northerly limit of the basin, at the proposed De Luz Dam site, because, I believe his statement brought out, the dam, if constructed, would cover the portion of the basin lying upstream from that. But the basin itself, as shown on the profile of the Santa Margarita-Temecula River, submitted as Plaintiff's Exhibit No. 9, reveals that

(Testimony of Allen C. Bowen.)

a wedge of alluvium exists considerably upstream from the site of the proposed De Luz Dam, which alluvium, in effect, is a part of the Santa Margarita basin.

Q. Well, you would say, though, that the width of the basin to which you are referring is correctly shown on Plaintiff's Exhibit No. 10, would you not?

A. That is correct.

Q. And Plaintiff's Exhibit No. 9 was the geologic cross-section AA?

A. Of the Temecula-Santa Margarita River, yes.

Q. Now, Major, it is a fact, is it not, that the irrigated pasture is a perennial crop and that it has to be irrigated during the summer season and has to be maintained year in and year out—an irrigated pasture is not an annual crop?

A. No, the definition of an irrigated pasture connotes a perennial type of forage.

Q. And most of the irrigation will take place during the summer months, or during the dry season?

A. That is the customary irrigation season for this part of the country.

Q. And the only reason for maintaining irrigated pasture would be for the pasturing of livestock, horses, sheep, and cattle, substantially?

A. That is the way that an irrigated pasture is customarily harvested.

Q. Have you made any effort to determine the number of head of cattle which an irrigated pasture

(Testimony of Allen C. Bowen.)

in the Santa Margarita River watershed in San Diego County will maintain?

A. A good irrigated pasture ordinarily can carry about, oh, two and one-half animal units, I would say.

Q. Per acre? [810] A. Per acre.

Q. And it would be necessary to fence the pasture, would it not?

A. Well, in order to get the optimum use of any pasture, a fencing system must be devised.

Q. It would be necessary to devise a fencing system, to keep the cattle from wandering over into the area cultivated for row crops?

A. Certainly, it is necessary to devise a fencing system, but it can be of a temporary nature, such as a single strand of charged wire, to keep the cattle from encroaching into other areas.

Q. In your opinion, would a single strand of charged wire keep the cattle from encroaching into other areas?

A. By and large, they have been found to have retained cattle within the boundaries of a pasture in that way.

Q. That is your opinion?

A. That is my opinion, and my observation.

Q. Have you made any effort to determine the cost of fencing the various tracts of land you determined to be used for irrigated pasture, and the cost of extending a pipe line to that property?

A. I have made no estimates of the cost of fencing, because, as stated, a temporary type re-

(Testimony of Allen C. Bowen.)

straint, which would cost very little, could be used, and of recent years I have [811] had no cause to build any fence, and the present costs of material and labor are beyond my knowledge, so I wouldn't be qualified to state how much per unit length the cost to build a fence would be.

Q. The same would apply to the cost of construction of a pipe line to the irrigated pasture?

A. I have made no estimate of the cost of a water-distribution system in this area.

Q. Did you make any investigation as to the cost of clearing that land?

A. Well, the cost of clearing would be nominal. The land could be treated as other similar lands in the area are treated. It is a commonly accepted practice in this part of the State to clear brush and subsoil land, and so forth, in preparation for irrigation. It would be the same in this area as it would be in similar adjoining areas.

Q. Also, it would be necessary to level it?

A. No, absolutely not. It would not be necessary to level it. You know, in your own service area over there, there are many rolling, hilly, irrigated pastures, some of which occupy rather steep lands, and which seem to be producing a satisfactory yield.

Q. They were all leveled, were they not, prior to the time that the grasses were planted?

A. No, they weren't leveled. Do you mean by "leveled," [812] leveling to grade stakes?

Q. No.

(Testimony of Allen C. Bowen.)

A. There has been practically none of that accomplished in this area.

Q. Not to grade stakes, just that the contour of the land has to be smooth, the rocks removed, and so forth.

A. You mean, does the seed bed have to be prepared? Is that what you mean?

Q. Yes, the seed bed prepared.

A. No, you prepare a seed bed to put the pasture mix in, certainly. It does not mean leveling. That is a misnomer. That usually connotes preparing grade stakes and moving earth with very heavy equipment.

Q. You didn't take that into consideration when you said the lands were to be used for irrigated pasture?

A. I certainly did. This land is no different than other lands subjugated to irrigation.

Q. Did you take the cost into consideration?

A. Well, it was hardly necessary to figure actual costs, because it is comparable to other areas in the locality which are being successfully developed for irrigation. Hence, we might infer that private owners are developing lands for irrigation, and this land being similar, therefore, could be so developed.

Q. Now, Major, calling your attention to this area [813] of irrigated pasture land located at the Ammunition Depot, which has a total area of 2,725.7 acres, and, in particular, calling your atten-

(Testimony of Allen C. Bowen.)

tion to the northeast corner of that plot, have you any idea of the elevation of that land?

A. Well, I did at the time that I drew up this proposed land-utilization plan, but I would have to compare this with a topographic map in order to give you the elevation. [814]

Q. Well, in connection with the preparation of your testimony and your charts and graphs and that map, and that that land was adaptable to irrigated pasture, did you take into consideration the expense of lifting water from the Pendleton basin to that particular tract or parcel of land?

A. No. As I say, I didn't take those factors into consideration because that area adjoins the Fallbrook Public Utility District which has been successfully irrigated by pumping water to rather high lifts for a number of years.

Q. Do you know any ground in the limits of the Fallbrook Public Utility District that is being devoted to irrigated pasture?

A. I can't of my own knowledge state that because I haven't made that detailed survey of the Fallbrook Public Utility District.

Q. Well, at no time have you had your attention called to any land within the limits of the Fallbrook Public Utility District which has been devoted to irrigated pasture or being used as irrigated pasture?

A. Well, I can't recall at any time having my attention called to any land in the Fallbrook Pub-

(Testimony of Allen C. Bowen.)

lie Utility District because I had no occasion to make surveys in there.

Q. So in connection with the preparation of your charts and tables you did not take into consideration either the cost of pumping water on the ground or the cost of preparing that [815] ground for irrigated pasture?

A. Only by inference. Those lands, as I say, are similar to other lands in this particular area, which have been subjugated to irrigation and I believe it is a proper assumption if private owners can develop similar lands for irrigated agriculture that these lands similarly situated can also be developed for irrigated agriculture.

Q. Major, do you know of any lands in this area or in the watershed of the Santa Margarita River or within the watershed of the San Luis Rey River that are being devoted or used for irrigated pasture where the owner has a lift of more than 200 feet?

A. Well, I might point out to you that on the upper limit of this we have indicated or, I have indicated, that the land is suitable for the production of avocados and in between that irrigated pasture or surrounded partially by that irrigated pasture area which you have pointed out to me, is an area adapted to row crops. And as you and I both know the returns from avocados or row crops is very high and we would be justified in pumping water up there for their use and at the same time that we were pumping water for the irrigation of

(Testimony of Allen C. Bowen.)

avocados and row crops it would cost us very little more to extend our distribution system to irrigate the pasture acreage that is in the vicinity.

Q. Major, do you know that the cost is approximately [816] \$5 an acre-foot to lift water 100 feet in this area, do you not?

A. I have had no occasion to examine any power costs in this area.

Q. Well, coming back to my question that I asked you a few moments ago.

The Court: What is the object of this testimony? To show economic feasibility?

Mr. Dennis: Economic feasibility, that is right. I am not going to pursue this much longer, your Honor, but I do have one or two more questions.

The Court: All right.

Q. (By Mr. Dennis): Major, will you answer my question that I asked several minutes ago and that is do you know of any area within the San Luis Rey watershed or Santa Margarita River watershed in San Diego County that is devoted to the use of irrigated pasture where there is a lift of more than 200 feet?

A. Well, I can't state certainly in regards to that, Mr. Dennis, because I have again not made the detailed survey but my observation say of Pauma Valley in the San Luis Rey watershed indicates that water is being lifted from 450 to 500 feet for the purpose of irrigation. And as I recall some of that land that is not suitable for avocados,

(Testimony of Allen C. Bowen.)

heavier land with a more gently sloping area, is being irrigated as pasture [817] land.

Now, I can't state of a certainty whether it is more or less than 200 feet above the point of diversion on the San Luis Rey River.

Q. Well, at those points on the San Luis Rey River, they would have an elevation of two or three hundred feet above sea level, would they not?

A. Well, there again I would have to consult a topographic map in order to check those figures.

Q. Well, in the preparation of your tables you did not take those elements into consideration?

A. The elevations of the land?

Q. The elevation of the land, the cost of raising water, the cost of fencing, the cost of piping, the cost of clearing and cost of planting.

A. In a general way, yes, but no specific or detailed studies were made of those elements.

Q. Now, I believe that you testified that the crops which you would expect, row crops which you would expect to raise on these areas which have been colored in brown, would be substantially the same type of crops which have been raised on the Stuart Mesa and South Coast Mesa in the past and the same type of row crops that Mr. Vail would raise on his property, is that correct?

A. Well, that is correct. I think that your statement [818] embraces about all of the crops generally adapted to this area. I certainly wouldn't want to limit it to crops which have been grown, which

(Testimony of Allen C. Bowen.)

otherwise might very well be adapted—might be introduced.

Q. And as I understand the different crops require a different duty of water. For instance celery will require more water than radishes or potatoes, perhaps, or corn?

A. That is right. Celery requires considerably more water than radishes.

Q. And you would expect in this area and in particular those parcels which you have shown as being adapted to row crops, that you would probably raise radishes, potatoes, corn, cauliflower, cabbages, tomatoes, peppers, parsley, is that correct?

A. Well, row crops is an all-inclusive term. It would include as what we generally consider field crops, such as sugar beets.

Q. And the duty of water for sugar beets would be comparably much less than that for, we will say, celery.

A. No, it would be comparable. The duty of water for each of these crops, of course, will vary but through a system of rotation and diversification of farming, why, the water duty ascribed to row crops of four acre-feet per annum would be about right.

Q. In accordance with the approved practices you would [819] expect the row crops to be rotated? You wouldn't plant tomatoes year after year or potatoes year after year? You would rotate your crops?

A. That is correct. That is found to be the most

(Testimony of Allen C. Bowen.)

acceptable practice. You probably would even put, say, alfalfa in down there from time to time. I made no attempt to work out a rotation, but alfalfa would take about the same amount of water, a little less there, than row crops, so it seemed for the purposes of establishing duty of water it was not necessary to develop a rotation over a period of years.

Q. Now, Major, calling your attention to Plaintiff's Exhibit 25-A. I notice that on each one of the various sheets which constitute a portion of that exhibit, that there has been a blue line or a dash with three dots interspersed in various places on the map or photostat. Did you have that superimposed?

A. This is Plaintiff's Exhibit 25-A. It is the actual field sheet and the entries made on here are all made in ink. The dashed, the blue line with the dash and three dots is the standard symbol for an intermittent stream.

Q. And were those blue lines superimposed on this map under your direction.

A. Those blue lines were. All lines were drawn on this map under my direction including the blue lines.

Q. Calling your attention to sheet—I wonder if you can tell me how to designate this particular sheet? 400/17? [820] A. That is correct.

Q. In the southerly portion of the area designated on that sheet and just opposite C623D2 I

(Testimony of Allen C. Bowen.)

see a line which designates that there is an intermittent stream in that particular locality?

A. That is correct.

Q. Have you ever seen water flowing on the surface of the ground in that particular locality?

A. Well, as a matter of fact I haven't had an opportunity to get around to all of these intermittent stream channels during periods of high precipitation when one might expect water to flow through them, so I can't state with safety whether I have ever seen water flow in a minor tributary such as you have just pointed out or not.

Q. So that you are not in a position to testify of your own knowledge whether or not there are intermittent streams in the various locations on Plaintiff's Exhibit 28 that are designated by this dot and dash line?

Mr. Shryock: 25.

Mr. Dennis: 25-A.

The Witness: I certainly am in a position because the stream occupies the lower portion of a small drainage area and any water that fell on that and ran out would naturally have to flow to the lowest part of the drainage area and thence travel down that to the next main stream. [821]

Q. In other words, these intermittent streams are placed in the thread of all barancas or channels which you figure there might be a run-off of water on the surface?

A. Well, as a matter of fact we didn't place the symbol on every channel or thread or baranca, if

(Testimony of Allen C. Bowen.)

you please, because they are multitudinous. You could carry it to the ultimate extreme and even up to a grain of sand at the top of the hill, which grain of sand would split a drop of water, a portion of which water would go on one side of the grain of sand and a portion of the water would go on the other side of the grain of sand, so by and large these intermittent stream symbols are drawn in here to convey the impression of the drainage area or the drainage system and doesn't purport to symbolize every channel which has been etched on the surface of the ground by erosion.

Q. And it doesn't purport to show that there is actually a surface stream at that point?

A. It purports to show that when there is sufficient run-off water will collect in that channel and run downstream.

Q. Have you ever seen any water in any of those channels?

A. Certainly I have seen water in some of those channels.

Q. But the majority of them?

A. Well, unfortunately we have, as you know, had a drought from 1944 until 1951 and there was little, if any [822] opportunity to observe water flowing in any of these channels.

Last year, the period during which run-off occurred, was so short that it would have been a virtual impossibility for me to inspect each of those channels to see if water was flowing through

(Testimony of Allen C. Bowen.)

it. But I can testify that water can and at times does flow through each one of those channels.

Q. You wouldn't expect to find any water flowing through channels through the dry season of the year?

A. No, I certainly wouldn't, not unless we had an unseasonal rain.

Q. Now, Major, calling your attention to Plaintiff's Exhibit 22 and in particular to the table which is attached to the Las Pulgas Canyon sheet, sewage effluent discharge for the years 1943 to 1952, do you know of your own knowledge whether the sewage discharge from Camp Pendleton plant No. 1 is returned to the Pendleton basin?

A. Yes; at the present time the sewage effluent discharged from Camp Pendleton sewage disposal plant No. 1 is returned to the Santa Margarita River watershed.

Q. Is that true for Camp Pendleton plant No. 2?

A. That is true for Camp Pendleton sewage disposal plant No. 2.

Q. And for Camp Pendleton No. 3?

A. No. 3 has always been discharging into the Santa Margarita River. [823]

Q. And Camp Del Mar, plants No. 4, 5 and 6, is discharged into the Pacific Ocean?

A. That is correct.

Q. Now, calling your attention to the Ocean-side sheet. I notice the shaded or hatched portion line just west of the highway. Does that represent any proposed development at the present time?

(Testimony of Allen C. Bowen.)

A. The cross-hatched area in black which is indicated on the legend, is proposed construction in 1952 lying in the Del Mar area and generally west of U.S. Highway 101. That was placed there in error. It actually should be up in the area shown as the infantry training center in grid square 6476 and 6475.

Q. And that is the proposed trailer camp to which Col. Robertson testified at the time he gave his testimony?

A. That is correct. [824]

Q. Now, Major, showing you Plaintiff's Exhibits 26 and 27 and Defendants' Exhibit D, the total of 26 and 27 for the month of March, 1943, should be the same as the figure which appears on Defendants' Exhibit D for the same period, should it not? In other words, does the total of the figures for each month of the year on 26 and 27 represent the same use as that which appears on Defendants' Exhibit D, sheet 1?

A. The plaintiff's exhibit, referring to Plaintiff's Exhibit 26, shows for March of 1943 the figure of 250 acre-feet. Plaintiff's Exhibit No. 27, for the same month, March of 1943, shows 66 acre-feet. Defendants' Exhibit D, which includes three tabulations, shows on sheet No. 1 for the month of March, 1943, 66.19. Sheet No. 2 of three of Defendants' Exhibit D shows nothing for March of 1943. The records did not go back that far. They began in October of 1944. Sheet No. 3 of Defendants' Exhibit D shows nothing for the month of March. The records began in 1946.

(Testimony of Allen C. Bowen.)

That 66 acre-feet agrees with the entry for March on Plaintiff's Exhibit No. 27.

Q. I don't think that I made myself clear, Major. The total of the figures for each month in Exhibits 26 and 27 represents the same quantity of water which is represented on table 7, sheet 1, which is Defendants' Exhibit D; is that correct.

A. Substantially correct. [825]

Q. Now, when you say "substantially," are there any modifications that should be made in that statement? What I am trying to find out, Major, if there is any use of water from the Santa Margarita watershed that was made by the Naval Reservation, which is not shown on sheet 1 of table 7, which is Defendants' Exhibit D.

A. Well, it is possible that there may be some differences between Plaintiff's Exhibits 26 and 27 and Defendants' Exhibit D, because they were prepared at different times and under different circumstances. I would have to check back on my original compilations for these tables in order to ameliorate any differences which exist there.

Q. But they do represent the same use of water?

A. They indicate the same use of water, that is correct.

Q. Now, Major, calling your attention to sheet 1 of table 7, Defendants' Exhibit D, that shows that the Naval Ammunition Depot consumed 5,890.10 acre-feet for the calendar year 1950, did it not—or, 1951?

A. Sheet 1 shows the monthly water consump-

(Testimony of Allen C. Bowen.)

tion of Camp Joseph H. Pendleton. That is sheet 1 of Defendants' Exhibit D. I believe you mentioned the Naval Ammunition Depot.

Mr. Shryock: He did.

Q. (By Mr. Dennis): Then this is exclusive of the United States Naval Ammunition Depot? [826]

A. Well, the three sheets here give the United States Naval Hospital and the United States Ammunition Depot separately from Camp Pendleton, and the three tabulations represent Defendants' Exhibit D.

Q. And the total for that year is approximately six thousand-odd acre-feet, is it not, for 1951?

A. The total for 1951 would be upwards of six thousand, I believe.

Q. And that represents all of the water which was used for agricultural, military, and recreational purposes?

A. All that was pumped out of the wells.

Q. Or diverted from the river?

A. Or diverted from the river.

Q. Now, calling your attention, Major, to Plaintiff's Exhibit No. 40, I notice for the year 1951 you show a total acre-feet of water utilized, both within and without the watershed of the Santa Margarita River, of 10,258 feet. How do you account for the discrepancy between the two figures?

A. The figures which are represented in Defendants' Exhibit D and in Plaintiff's Exhibits 26 and 27 I believe merely show the water as metered from the wells.

(Testimony of Allen C. Bowen.)

Plaintiff's Exhibit No. 40 shows that same figure, and adds to it the water which is withdrawn from the underground basin for the forage growing on the surface of that basin.

The figure ascribed to that, as represented in my testimony [827] for the plaintiff, was considered to be conservatively one acre-foot per acre per year, a direct withdrawal from the basin for the forage growing on the surface.

The basin area is approximately 4,535.3. I believe I said in my previous testimony it was in excess of four thousand, and using, or ascribing a use of an acre-foot per acre per year, withdrawal by the plants from the underground basin, that figure of approximately 4,500 acre-feet per year was added to column No. 2 on Plaintiff's Exhibit No. 40, which shows the quantities of water utilized within the Santa Margarita watershed, and that, of course, would be reflected in the totals, which is the last column, and that would account for the discrepancy between these pumpage figures, as shown in Defendants' Exhibit D and Plaintiff's Exhibit 40.

Q. And that four thousand acre-feet to which you refer would be what is known as a loss by transpiration?

A. No, that would not include all of the transpiration loss in there. A part of the water goes to build a forage plant itself.

Q. There is no portion of that four thousand acre-feet that was actually withdrawn by artificial

(Testimony of Allen C. Bowen.)

means for use on the basin, to irrigate the grasses and weeds and other row crops?

A. No, it was drawn by the natural functions which are [828] inherent within the plant structure.

Q. Itself.

A. The root system picks the water up out of the underground basin and uses it to build the top of the forage portion of the plant.

Q. Now, were the answers which were prepared to the requests for written interrogatories of the Fallbrook Public Utility District prepared in your office and under your direction?

A. They were.

Q. Are you familiar with those answers, in a general way?

A. Well, a lot of answers have passed under the bridge. I would have to look at them and refresh my memory.

Q. Well, particularly——

A. As I recall, some of them were prepared and filed the 7th of January of this year.

Q. Particularly, I had in mind table No. 11, in which you were requested to give the amount of water used by each lessee who was leasing agricultural lands, and also table No. 12, and at that time I think you made the answer that the amount of water which was used by the respective lessees is not available.

A. That is as the answer appears on these tabulations.

Q. Have you acquired any information or rec-

(Testimony of Allen C. Bowen.)

ords which [829] would enable you at this time to give the amount of water which was used by the various tenants?

A. I believe those figures could be supplied by the ranch manager at this time. I have none of that data with me. Frankly, I wasn't prepared to be the defendants' first witness.

The Court: It shows you what clever lawyers can do. Besides, I warn you he is calling you under a tricky section, that, so far as it gives answers favorable to him, he may take them. So far as not favorable, he can put on a witness to contradict you. That is a specific provision of the federal law, but it is not new. We have had it in California for over 20 years. It is known as Section 2055 of the Code of Civil Procedure, and in federal practice it is known as Section 43 (b). You may call an adverse witness and ask him leading questions, and what you like you keep, and what you don't like, you put on a different witness to contradict.

The Witness: I am getting a liberal education as a lawyer, your Honor.

The Court: That is right.

Q. (By Mr. Dennis): Major, this morning when we were referring to Exhibit 22, I called your attention to certain irrigation or water-distribution systems which were located in Las Pulgas Canyon. That water-distribution system or irrigation system is not tied in to the system which derives the water from the Santa Margarita watershed, is it? [830]

A. No, it is not.

(Testimony of Allen C. Bowen.)

Q. And the same would be true as to the irrigation systems or water-distribution systems which are located in Horno, San Mateo, and San Onofre Canyons?

A. I don't recall any distribution system in Horno Canyon, but San Onofre and San Mateo do have water-distribution systems, which were not, no, sir.

Q. When I said "Horno," I was in the wrong watershed, as I was this morning.

Now, has the Naval Reservation, since it acquired title to the properties, ever irrigated any crops outside the watershed of the Santa Margarita River with water obtained from the watershed of the Santa Margarita River, with the exception of those portions of South Coast Mesa and Stuart Mesa which lie outside the watershed?

A. Well, they have irrigated some lawns.

Q. Outside of the watershed?

A. Outside of the watershed.

Q. That would be in Camp Del Mar?

A. Partly in Camp Del Mar, partly in the main area, up there on the hill.

Q. There has been no water used for irrigation within the limits of the Fallbrook Naval Ammunition Depot?

A. There, again, with the exception of lawns and flowers, your statement is substantially correct.

Q. In connection with the camp and quarters occupied by the plaintiff?

(Testimony of Allen C. Bowen.)

A. That is correct. To the best of my knowledge, that is correct.

Q. When I am referring to irrigation, I am referring to irrigation of pasture or row crops.

A. I am not aware of any commercial irrigation that has been engaged in up there.

Q. That would be true in any portion of the watershed from a line drawn approximately across the watershed in the lower reaches of the Ysidora basin?

The Court: Mr. Dennis, wouldn't the use of water for lawns or flowers incidental to residences be more a part of the domestic use than strictly irrigation use?

Mr. Dennis: That is my understanding, that such waters as you need to irrigate a small family orchard or lawns are a part of the domestic use.

The Court: Are a part of the domestic use. That is the accepted use. When you talk about irrigating is when you go into acreage and grow crops or develop pasture for other than the immediate domestic use of a person.

Mr. Dennis: Yes. Do you recall my question, Major?

The Court: I think he answered it.

The Witness: No, I didn't answer it. Will you read the question? [832]

(The question was read.)

The Witness: Your reference line, Mr. Dennis, is rather vague. Would you clarify that, please?

Q. (By Mr. Dennis): Well, if we should draw

(Testimony of Allen C. Bowen.)

a line across the Santa Margarita watershed at a point where there appears Camp Pendleton, between "Camp Joseph H. Pendleton Naval Reservation," directly across the watershed until about the head of where it would intersect the "C" in "Newton Canyon," are there any lands lying above, upstream from that line, which have been irrigated?

A. Let's pin it down to the intersection of the crest of the watershed, as shown on Defendants' Exhibit A, with the northerly boundary of Section 4, Township 11 South, Range 5 West, proceeding thence southeasterly to a point approximately in the center of Section 1, Township 11 South, Range 5 West, San Bernardino Base Line Meridian. And your question was, upstream from that point, had there been any substantial irrigation within the watershed, the Santa Margarita River watershed, lying within Camp Pendleton——

Q. That is correct.

A. ——U. S. Naval Hospital, and U. S. Naval Ammunition Depot, and the answer is there has been none to my knowledge, upstream from that point referred to.

Mr. Dennis: I think that is all.

The Court: All right. [833]

Mr. Shryock: Do you mean, Mr. Dennis, that we may now cross-examine your witness?

Mr. Dennis: As I said, I called this witness under Section 43 (b) of the Rules of Civil Procedure.

(Testimony of Allen C. Bowen.)

The Court: Read the rule, Commander. You don't have to. You can ask questions, but, you see his examination is cross examination. You may ask questions, but, unlike him, you are bound by what he says. [834]

Cross Examination

Q. (By Mr. Shryock): If your Honor please, we propose to be most agreeable about this. We are delighted to have Major Bowen come here and add, from his inexhaustible fund of knowledge, to the information that we seek to provide to the court. But I would like Mr. Dennis to tell me where the Major fits under Rule 43 (b) under which he called him.

I am quite happy to have him call Major Bowen as his witness but I fail to see where Major Bowen qualifies under Rule 43 (b). And as I say we are most agreeable about it.

The Court: Well, I will tell you why. I will tell you how he qualifies.

Paragraph 2 says: "A party may call an adverse party or an officer, director or managing agent, or a public or private corporation or of a partnership or association which is an adverse party."

And I presume that one in charge of a certain department of work would fall into one of those categories, but I don't know which.

But I am going to say that I am satisfied, since becoming acquainted with the Major during the course of these proceedings he is going to tell the truth as he sees it no matter who calls him, so let us not be technical. [835]

(Testimony of Allen C. Bowen.)

Mr. Shryock: Very well, sir. We just didn't want to concede too readily.

The Court: This says the witness may be cross examined by the adverse party only upon the subject matter of his examination in chief. So, if you desire to do so, technically, under the State law, it is not called cross examination but this section calls it that. It has been in existence and it is a very good section if not abused. I am sure Mr. Dennis wouldn't abuse it.

Mr. Dennis: I thought it was an excellent section, your Honor.

The Court: Are you going to take some time with the witness?

Mr. Shryock: I think I might be some minutes at least.

The Court: Let us take a brief recess, not over 10 minutes.

(Short recess.) [836]

The Court: I am sorry, gentlemen. The lawyers have followed me from Las Vegas. They are here now.

Off the record.

(Statement off the record.)

The Court: All right. Let's go on.

Mr. Shryock: Your Honor please, I believe we can contrive to make this mercifully short.

The Court: I see. We will move faster tomorrow, gentlemen. There is always a tremendous lot of work when you are interrupted. As you see, the administrative work in a court of this size takes a good deal of time, and to try to do my full share

(Testimony of Allen C. Bowen.)

of trial work, as I have done, requires a lot of effort.

Mr. Shryock: Yes, sir.

The Court: So far I have succeeded. I don't know how long I can keep this up.

Mr. Shryock: Yes, sir.

Q. (By Mr. Shryock): Major, is it customary for the United States Marine Corps to billet soldiers in uncompleted structures or in structures in the process of construction?

A. It is not customary to billet troops in barracks that are under construction. Rather, they are placed in tents if the troops will appear before permanent facilities are available for billeting.

Q. Major, have you at any time ever asserted that San [837] Mateo, Las Pulgas, or San Onofre Creeks or Valleys or watersheds were within the watershed of the Santa Margarita River?

A. I have not. In fact, in response to Mr. Dennis' questions, I stated that they were outside of the watershed of the Santa Margarita River.

Q. Had they ever been so represented on any exhibit of the plaintiff in this case?

A. They have never been so represented.

Q. Now, I believe at one point, Major, Mr. Dennis asked you why Camp Margarita appeared on one of the sheets of Exhibit 22, and not on others. Could you explain how that occurs?

A. Yes, I can. The area occupied by Camp Margarita, which is currently under construction, appears only on one of the sheets placed in evidence

(Testimony of Allen C. Bowen.)

as Plaintiff's Exhibit No. 22, and, hence, the symbol showing the location of that camp could only be placed upon the one sheet where the location appears, whereas, in some of the other camp areas which Mr. Dennis asked me about, the great overlap between adjoining sheets showed the same area twice in some instances.

Q. Simply because they were within the overlap area?

A. That is right. In the overlap area we symbolized the construction, and so forth, clear out to the edge of the sheet, on each sheet of the four.

Q. Major, you have been shown a number of exhibits [838] which were, among other things, tables submitted in the answers to interrogatories. Are there any of those exhibits—and I am speaking now of B, C, and D, and tables 13, 22, and 7—which are not covered by plaintiff's exhibits, as set forth in the pretrial order?

A. I believe that most of that information is shown on Plaintiff's Exhibits Nos. 26, 27, 40 and 39. The method of preparation, of course, is a little different in each instance. That is as concerns the plaintiff's exhibits and the tables entered as Defendants' Exhibits C and B and D. [839]

Q. Of course 39 and 40 were not a part of the pretrial exhibits but were introduced after the case in chief was begun, is that not correct?

A. That is correct.

Q. Well, was there any difference in the char-

(Testimony of Allen C. Bowen.)

acter of preparation of the exhibits and the tables to which we have made reference?

A. Very much so. These tables that were prepared in answer to interrogatories of the defendant Santa Margarita Mutual Water Company and now entered as Defendants' Exhibits B, C and D, were prepared by the Office of Ground Water Resources under great duress.

The time given us was very small. About 10 days or two weeks as I recall and it didn't provide adequate time for exhaustively checking the records and checking back on the figures. So we might say that great duress was applied in the preparation of the Defendants' Exhibits B, C and D whereas the Plaintiff's Exhibits 26 and 27 were prepared with adequate time to check the information and examine all of the records thoroughly.

Q. Well, if you should find any discrepancy between those two classes of exhibits what can you state as to the degree of accuracy with which you would regard either class?

A. Well, since the time element was in our favor in the preparation of Plaintiff's Exhibits 26 and 27 and we were not [840] working under pressure in their preparation, I would say that the information depicted thereon is perhaps of a higher order than that prepared on Defendants' Exhibits B, C and D which were supplied, as I stated, in answer to interrogatories and upon very short notice.

Q. Now, Major, I believe that earlier Mr. Den-

(Testimony of Allen C. Bowen.)

nis asked you about certain land as shown on this Exhibit A, up in the DeLuz Creek watershed which he characterized as not having been within the original ranch grant, I believe. Do you recall that?

A. I do.

Q. And that was correct, there is such land, is there?

A. Yes, there is as shown by Plaintiff's Exhibit No. 43.

Q. And was such land included in your land utilization map, Exhibit 24?

A. Yes. All of those lands were classified and are represented in the land classification map, Plaintiff's Exhibit No. 23.

Q. And as to those lands—I beg your pardon, 23. And as to those lands, Major, the ones not in the original ranch grant, can you state within what soil conservation classification number those lands fell?

A. Those lands fell largely in the Class VIII. I would say that better than 95 per cent of those lands were included in class 8 and of the very small acreage which is considered [841] suitable for irrigation, portions of that were not transferred to Plaintiff's Exhibit No. 24 nor was water recommended for them because they were small and disassociated from other larger irrigable acreages.

Q. Even though they might properly have been classified as irrigable?

A. They were classified as irrigable on Plaintiff's Exhibit No. 23 and Plaintiff's Exhibit No.

(Testimony of Allen C. Bowen.)

25-A and -B. But as I stated, in the preparation of Plaintiff's Exhibit No. 24 some of those smaller areas were not carried forward under the land utilization program recommended for the camp area lying within the Santa Margarita River watershed.

Q. Major, did I understand you correctly to say that the so-called watersheds of DeLuz Creek and Fallbrook Creek are themselves entirely within the watershed of the Santa Margarita River and riparian to that river?

A. If the land that drains directly in both the Fallbrook and DeLuz Creek lie within the Santa Margarita river watershed, those two creeks, Fallbrook and DeLuz are tributary to the Santa Margarita River.

Q. Now, I believe in discussing irrigable pasturage at one point, on Mr. Dennis' Exhibit E, which was simply our Exhibit 24 colored, he asked you about certain lands near the Naval Ammunition Depot, I believe, and asked what the sole source of water for irrigating that irrigable pasturage would [842] be and if I recall correctly and please correct me if I do not, you stated that the basin, the Santa Margarita River basin would be the source of that water. Do you recall that?

A. That is correct.

Q. Did you take into consideration, Major, any water which might be coming down through the Temecula Canyon, the three second-feet provided by the stipulated judgment?

(Testimony of Allen C. Bowen.)

A. Why, certainly, if that water that was supplied in accordance with the stipulated judgment between the Vail and Rancho Santa Margarita River reaches the Camp Pendleton area it replenishes the underground supply of water in the Santa Margarita River basin.

Q. And in that sense then you took it into consideration?

A. Certainly.

Q. Even if the water were not used to recharge the basin, the three second-feet, it conceivably could constitute a source of surface water, could it not, and be a source of diversion for irrigable pasturage?

A. Very true. It could be operated by throwing up a small diversion structure and diverting it directly from the surface flow.

Q. Of course I am assuming someone doesn't step in and take away two and a half of the three second-feet before it gets to you.

A. If the water doesn't get to us obviously we can't use [843] it.

Q. Major, can you tell us the source of the water used for irrigating the golf course?

A. At present the water used for irrigating the golf course is sewage effluent discharged from sewage disposal plant No. 1, located in the 17 area of Camp Pendleton. [844]

Q. Now, one final question, Major: In preparing a land-utilization study, what is your primary objective in that study?

(Testimony of Allen C. Bowen.)

A. You mean, Commander, a land-classification study or a land-utilization study?

Q. A land-classification study and a land-utilization study.

A. The land-utilization study necessarily follows and is based thereon.

Q. The land-classification study comes first, does it not? A. That is correct.

Q. In that classification study you determine what primary things?

A. The land-classification survey determines the inherent characteristics of the soil, including their site position.

Q. And in the land-utilization study, by way of contrast, you do what?

A. The land-utilization study shows, generally, the type of crops that would be adapted to those classes of land which have been determined as irrigable by the land-classification survey.

Q. And you say "would be adapted." Is that sufficient for the purpose of such a study, as to whether it would be? [845]

A. Well, they are adapted—of course, those crops are adapted to the areas indicated, provided sufficient water can be supplied to them.

Q. Well, let us assume for a moment that you determine a certain area is suitable for avocados. Does that necessarily mean that your study includes a planning of the actual planting of the avocados, of putting in an irrigation system, of determining the location of the pipes, of determining sources

(Testimony of Allen C. Bowen.)

of water and the costs of the installation of the system?

A. No. These types of surveys must necessarily precede any exhaustive engineering surveys to determine the construction of a water-distribution system. The engineering surveys are made always following land-classification and land-utilization surveys to determine, in the first place, if it is economically feasible to go ahead and spend money on further surveys and investigations to see if water can be brought to them.

Q. Now, have you, in representing to this court that there are some eighteen thousand-odd irrigable acres out of some thirty-seven thousand acres, sought to represent to this court that you have studied a plan whereby those eighteen thousand acres would be placed under actual cultivation?

A. No, I have not sought to represent that. As stated to Mr. Dennis, in response to his examination, the only [846] criterion upon the practicability and feasibility of developing these irrigation lands is by reference to lands similarly situated in this general vicinity, and there are lands similar to these that are being irrigated, in San Diego County particularly.

Q. And, finally, Major, is it true that you have included in a figure such as the eighteen thousand-odd irrigable acres only those which you consider to be economically feasible for irrigation?

A. I would consider these irrigable lands as

(Testimony of Allen C. Bowen.)

being susceptible of practical and economical irrigation.

Mr. Shryock: I believe that is all.

Redirect Examination

Q. (By Mr. Dennis): Major, I believe that in January, 1952, certain answers were prepared in response to written interrogatories filed by the Fallbrook Public Utility District.

A. That is correct.

Q. And I believe those were prepared in the Office of Ground Water Resources and under your supervision.

A. That is correct.

Q. I believe that table No. 1, which consists of three sheets, and table No. 4, which consists of three sheets, were prepared in response to certain questions—

A. That is correct. [847]

Q. —propounded by the Fallbrook Public Utility District. I believe that the answers, or the tables which you included in the answers to the Santa Margarita written interrogatories as tables 7 and 13, are copies of those tables.

A. Yes, to the best of my knowledge, they are. They are not exact copies. I would have to examine them in more detail. These sheets which were submitted in answer to Fallbrook Public Utility District's interrogatories are Ozalid prints, whereas the tables submitted in answer to Santa Margarita Mutual Water Company are carbon copies or typed sheets. The manner of arrangement is different. They are not exact copies one of the other.

(Testimony of Allen C. Bowen.)

Q. The information which was requested, though, and the information which was given, that is, the number of acre-feet that were used on various projects in Camp Joseph H. Pendleton are exactly the same, are they not?

A. Yes, the basic records.

Q. So that you had not only the time to prepare your answers to the Fallbrook interrogatories, but you had from January to June to which to check and see whether the information given was correct?

A. Well, as a matter of fact, when we prepared the answers to interrogatories posed by the Santa Margarita Mutual Water Company, as I recall, where we had submitted answers already to interrogatories posed by the Fallbrook Public Utility District, we simply copied that information, without further examination of the basic data.

Mr. Dennis: That is all.

Mr. Shryock: Thank you very much, Major.

(Witness excused.)

The Court: All right, gentlemen, tomorrow morning at 10:00 o'clock.

(Whereupon, at 4:50 o'clock p.m., Tuesday, November 18, 1952, an adjournment was taken until 10:00 o'clock a.m., Wednesday, November 19, 1952. [849])

Wednesday, November 19, 1952, 10:00 a.m.

The Court: Cause on trial.

Mr. Dennis: Were you through, Commander Shryock?

Mr. Shryock: Yes.

Mr. Dennis: I would like to call Mr. Hall for cross examination. At the time that I was cross examining Mr. Hall I thought that the plaintiff was going to put on certain evidence to tie in certain things in his testimony and as it didn't develop I would like at this time to ask him certain questions in regards to the maps which he prepared.

Mr. Shryock: Are you calling Mr. Hall under Rule 43(b).

The Court: No, no.

Mr. Dennis: No.

The Court: Just additional cross examination?

Mr. Dennis: Yes, just some more cross examination.

Mr. Shryock: Well, your Honor, it seems to me that he is calling Mr. Hall as his own witness at this time.

The Court: I don't know that it makes any difference.

Mr. Dennis: It wouldn't make too much difference. I think Mr. Hall will tell the truth anyhow.

The Court: All right.

Mr. Shryock: I am sure he will tell the truth but, of course, the Government has retained the services of Mr. Hall as an expert witness and we had finished our examination with [852] him.

I am sure I sympathize with the fact that I may not always conform to what Mr. Dennis expects me to do. He finished his cross examination of him and if you would like to apply for a recess for the purpose of discussing retaining Mr. Hall as your expert

witness I would be certainly not opposed to that.

The Court: Well, I think we are taking a lot of time worrying about things that may not be cause for worry.

I think if he desires to call him to ask him additional questions that he omitted asking I will allow him to do it at the present time.

Mr. Shryock: Yes, your Honor.

The Court: All right, let us go ahead.

H. M. HALL

having been previously sworn, resumed the stand and testified as follows:

Cross Examination—(Continued)

Q. (By Mr. Dennis): If the court please, with the permission of counsel for the plaintiff, since Mr. Hall last testified, he has taken a red and green pencil and on Plaintiff's Exhibit 32 outlined certain areas which represent the various grants which comprise the Vail holdings and I would like to ask Mr. Hall at this time if the area which he has outlined in red represents the original extent of the Pauba grant? A. That is correct.

Q. And the area which is outlined in green delineates the original area of the little Temecula grant? A. That is correct.

Q. And the area which you have outlined in blue represents the original Temecula grant?

A. Only the southern part.

Q. That is the portion which is now owned by Mr. Vail? A. Yes.

(Testimony of H. M. Hall.)

Q. And when I say "Mr. Vail" I am referring to the Vail interests? A. Vail Company.

Q. And then southerly and easterly from that area you have outlined another area in red and that outlines the original boundaries of the Santa Rosa Ranch?

A. If you change easterly to westerly.

Q. Westerly?

A. That is correct. [854]

Q. Now, Mr. Hall, I want to call your attention to a map which shows that it was prepared by A. L. Sonderigger, and ask you if that was the map which was prepared under your supervision and bears your certificate in the upper left-hand corner, and is a copy of the map which was filed with the Division of Water Resources of the State of California as a part of the Vail application to appropriate waters of the Santa Margarita River.

A. That is correct, yes.

Mr. Dennis: I would like to offer this map in evidence as Defendants' Exhibit—is it E?

Mr. Shryock: F.

Mr. Dennis: —F.

The Witness: Isn't this only a part? Aren't there two parts to this?

Mr. Dennis: I believe there is another part which shows the location of the dam site.

The Witness: Yes, and the easterly end of the Pauba Valley.

Mr. Dennis: If there is, the Division of Water Resources did not furnish it.

(Testimony of H. M. Hall.)

The Witness: This shows only a part of the land to be irrigated.

Q. (By Mr. Dennis): Now, Mr. Hall, as I remember your testimony on direct examination, you stated that the Vails [855] were irrigating approximately 4500 acres of land at the present time.

The Clerk: Mr. Dennis, the court never admitted this.

Mr. Dennis: Oh.

The Clerk: Is this exhibit admitted, your Honor?

The Court: It may be received.

The Clerk: That is F in evidence.

(The map referred to, marked Defendants' Exhibit F, was received in evidence.)

The Witness: There is a little less than 4500 acres under the present irrigation system.

Q. (By Mr. Dennis): Is there any of that acreage that is being irrigated at the present time that does not overlies what is known as the Temecula alluvial basin?

A. The delineation of the Temecula alluvial basin is one thing, speaking from a surface indication, and another thing speaking geologically. If we speak of it geologically, then there is no part being irrigated except what overlies the basin, but there is some being irrigated that is beyond the ordinary surface indication.

Q. Approximately how many acres?

A. In the neighborhood of four or five hundred.

(Testimony of H. M. Hall.)

Q. Approximately how long has that land been irrigated, that you know of?

A. To my knowledge, it has been irrigated since 1918, [856] when I first was on the ranch, but it was under irrigation at that time.

Q. Now, are you familiar with the location of the San Diego aqueduct, so-called, or feeder line?

A. Yes.

Q. And that crosses the Temecula-Santa Margarita River in the vicinity of the junction of Penjango and Murrieta Creek with the Temecula?

A. Considerably above that. It is above the old highway bridge.

Q. Approximately how far above the confluence with the Murrieta?

A. Three-quarters of a mile.

Q. And have the Vails irrigated any property below the Railroad Canyon gauging station?

A. No.

Q. There is a very small proportion of their holdings that lies below the Railroad Canyon gauging station?

A. It is about a half-mile from the gauging station to the ranch line.

Q. Approximately how many acres do they have that lie below the Railroad Canyon gauging station?

A. That is a lineal dimension you are giving me. It would depend upon the width you consider. But did you mean irrigable acres? [857]

Q. Irrigable acres, yes.

(Testimony of H. M. Hall.)

A. I don't think there is any in the grant, that is, that is riparian to the Temecula stream.

Mr. Dennis: I think that is all.

The Court: All right.

Mr. Shryock: Mr. Dennis, I merely want to get the record straight. I am a little confused myself. Did you ask Mr. Hall whether all of the Vail lands being irrigated overlie the Temecula alluvial basin?

Mr. Dennis: That is correct.

Mr. Shryock: All of them? All of the 4500 acres, almost, that he testified to?

Mr. Dennis: That is correct. [858]

Mr. Shryock: Did you not then ask Mr. Hall what is that acreage when he said "yes, they do overlie all of what is known geologically the basin." Did you not say then "How many acres is that?"

Mr. Dennis: I don't believe so.

Mr. Shryock: And I thought Mr. Hall answered four or five hundred.

Mr. Dennis: No. I think that was four or five hundred acres which did not overlie.

Mr. Shryock: Could you straighten us out on that, Mr. Hall?

The Witness: That was my understanding. He asked if any of the land did not overlie the basin.

Mr. Shryock: Did not overlie?

The Witness: Yes. And I said there was four or five hundred which did not.

Mr. Shryock: Did not overlie. Thank you very much, Mr. Hall. No further questions.

The Court: All right, Mr. Hall.

Mr. Dennis: I want to call Col. Robertson under Rule 43(b) of the Rules of Civil Procedure.

The Court: All right.

Mr. Shryock: Now, if you Honor please——

The Court: Let us not argue about it. I knew this was coming because you didn't hear a statement Mr. Dennis made in [859] one of the many informal conferences we had. He said he probably wouldn't have his own experts because he thinks the facts will be established by your experts and that all he will do is elicit certain facts and then argue the law.

Didn't you hear him make that statement?

Mr. Shryock: I recall reading it, yes, sir.

The Court: I heard him make the statement.

Mr. Shryock: May I have your Honor's permission to state for the record that we propose to continue to be agreeable about this and are delighted to have the Colonel return, but we would prefer not to concede that he qualifies under Rule 43(b) and that we consider he is Mr. Dennis' witness.

The Court: All right. We are dealing with the Government of the United States and I don't know who is and who is not an agent. I presume theoretically General Smith would be the only one and you would object very much if they brought him in here and asked questions about something he knows nothing about. So long as these are subordinates or civilian employees we will let them testify.

ELIOTT B. ROBERTSON

having been previously sworn, resumed the stand and testified further as follows:

(Testimony of Elliott B. Robertson.)

Cross Examination—(Continued)

Q. (By Mr. Dennis): For the purpose of the record I believe Col. Robertson [860] testified, I think it is on page 631 and 632 of the transcript, that from 1946, February of 1946 to February of 1951 that he remained in the same specific job as assistant head of the Utility Public Works Section of the Marine Corps and that on February of 1951 he stated he relieved his superior and became the head of the Utility and Public Works Section which job he now occupies. And that he also assumed the additional and collateral duty which accompanied the assignment which is entitled "Recorder of the Marine Corps Station Development Board" and that he has personally been directed and charged by the Assistant Commandant of the Marine Corps to the responsibility and duty of looking at each and every station and project and recommending to the board the approval or disapproval, modification and relative merit with regard to other projects which may be submitted by other stations and I would like that, in view of his duties—in view of those duties I feel he is qualified under that section.

The Court: All right.

Mr. Dennis: I just wanted to make that statement, your Honor, for the record.

Q. (By Mr. Dennis): Now, Colonel, are you familiar with the location where the Fallbrook Public Utility District has been making diversions?

A. I have visited it.

Q. And are you familiar with its location in

(Testimony of Elliott B. Robertson.)

regard to [861] Railroad Canyon gauging station and the Fallbrook gauging station?

A. I know it is downstream. I have never measured the distance.

Q. I mean it is downstream from the Fallbrook gauging station and downstream from the Railroad Canyon gauging station?

A. (No answer.)

Mr. Shryock: Excuse me, Mr. Dennis. Just so the witness isn't confused, are you asking him whether the Fallbrook gauging station is downstream from the point of diversion of Fallbrook?

Mr. Dennis: No. I am asking whether or not Fallbrook's point of diversion on the Santa Margarita River is downstream from the Fallbrook gauging station.

Mr. Shryock: In other words from both of the gauging stations you mean?

Mr. Dennis: Yes.

Mr. Shryock: And not between them?

Mr. Dennis: That is right.

Mr. Shryock: Did you understand that question?

The Witness: I focused my mind on the Railroad Canyon gauging station as downstream from that. I don't know its relative position to the other one.

Q. (By Mr. Dennis): You don't know whether it is upstream [862] or downstream?

A. It is not on our land and I never visited it.

Mr. Dennis: I am not sure either as to its loca-

(Testimony of Elliott B. Robertson.)

tion and I think that is one of the things we should get into the record.

Q. (By Mr. Dennis): Now, you are familiar with the water problems of the United States Naval Ammunition Depot and Camp Joseph H. Pendleton and the United States Naval Hospital, are you not?

A. To some degree.

Q. And I believe that the United States Naval Hospital has on occasion been unable to obtain a sufficient supply of water from the pumping station which they maintain on the United States Naval Ammunition Depot, from the Santa Margarita River, is that right?

Mr. Shryock: May we have that question read, please?

(Question read.)

The Witness: I am not aware that the hospital maintains a pumping station on Fallbrook.

Q. (By Mr. Dennis): Pardon me?

A. I am not aware that the hospital maintains a pumping station on the Naval Ammunition Depot.

Q. Do they maintain their own pumping station?

A. The pumps are outside the ammunition depot so far as I know.

Q. But they do maintain their own pumps? [863]

A. That is correct.

Q. Has there been any time when they did not secure sufficient quantity from the Santa Margarita River to meet their needs?

Mr. Shryock: If you know, Colonel.

(Testimony of Elliott B. Robertson.)

The Witness: The answer is no but there was a time when we had to take action to get it from another well.

Q. (By Mr. Dennis): Over how long a period?

A. They never actually ran out. We took preventive action.

Q. And has there been any time when there was not sufficient water obtained from the Santa Margarita River to meet the military demand of the United States of America at Camp Joseph H. Pendleton?

A. There have been numerous times and periods when we could not get water that we normally would use for military requirements, but by strict conservation and sacrifice we were able to get by.

Q. How many periods have you experienced such a thing since you acquired the property in 1942?

A. I couldn't testify to that, to the total.

Q. Now, has there been any time when the United States Naval Ammunition Depot could not secure sufficient water to meet their requirements for military purposes?

A. There are two times to my knowledge. There may have [864] been more.

Q. And when did those occur?

A. In the summer of 1951 and summer of 1952.

Q. But at all other times they have had sufficient water?

A. I don't know whether they have or have not.

Q. At least, it has not been called to your atten-

(Testimony of Elliott B. Robertson.)

tion that they were short of water on any other occasions than those to which you just testified?

A. I have never sought to find out.

Q. Now, there are users of water located between the Vail properties and Camp Joseph H. Pendleton, are there not, on the Santa Margarita River?

A. I would suppose so.

Q. Well, you have inspected the watershed, and you have seen the pumps and diversion dams on the river?

A. I have not inspected all of them. I have flown over them. The only point I visited was the Fallbrook diversion.

Q. Now, I believe that at the time that the court and counsel made an inspection of the plaintiff's properties and the Vail properties in 1952 you were present, were you not?

A. That is correct.

Q. At that time was there any water flowing in the Santa Margarita River below the De Luz dam site? A. No.

Q. At that time was there any water flowing under [866] Highway 101 on the Vail properties?

A. 101 is not on the Vail properties, if that is the question.

Q. Pardon me. Highway 395.

A. There was.

Q. Do you remember the estimate of the quantity of water that was flowing at that point, that was given by Mr. Hall on that trip?

A. I did not hear it.

(Testimony of Elliott B. Robertson.)

Q. Do you recall that when we were passing the Vail dam we crossed a small tributary of the Santa Margarita-Temecula River, that was at that time discharging water into the Vail Lake?

A. I don't specifically remember.

Q. Do you recall whether any water was being released from the Vail Dam at that time?

A. None.

Q. Now, I believe that the location of the diversion dam maintained by the United States Naval Ammunition Depot for the collection gallery, as we have called it, was downstream from the Fallbrook gauging station——

A. I believe——

Q. ——but upstream from the northerly or easterly limits of the Camp Pendleton basin; is that correct?

A. As I said before, I am not sure where the Fallbrook [867] station is. I believe it is above, and the diversion of the Ammunition Depot is above the basin which we have described as beginning at De Luz and going down.

Q. Now, Colonel, calling your attention to Plaintiff's Exhibit 22, and, in particular, to the sheet which is entitled "Las Pulgas Canyon," there is a hatched area there located in Las Pulgas Canyon, and opposite the hatched area we find the figures, 3000 men in 1952, and 3500 men in 1953.

Does that represent the number of men it is proposed to billet there?

A. That indicates the new billets either under

(Testimony of Elliott B. Robertson.)

construction or intended to be constructed at that point. That does not indicate the total number of men that will be there.

Q. But they will accommodate that number of men?

A. That is the designed capacity. I might say the "3,000 men in billets" are now under construction. The "3500 men" shown there are a part of that which I previously described as having been withheld by the Congress because of the water situation.

Q. And your testimony would be the same as to each one of the hatched areas that appear on the other sheets in Plaintiff's Exhibit 22?

A. Yes; that is, of those four camps. There are other hatched areas.

Q. Yes, that is true. When you say that a man would [868] be billeted in that area, you mean that he would eat, would sleep, and would bathe in that particular area?

A. That is his place when he is not in the field training.

Q. And the requirements for water for the individuals that would be billeted there would be practically exclusively satisfied from that particular water-distribution system that furnish that area?

A. That is correct.

Q. Now, I noticed a great number of the plaintiff's exhibits are labeled "Confidential." That was for reasons of military security, was it not?

A. I don't think I could give a general answer

(Testimony of Elliott B. Robertson.)

to that without looking at the exhibits. In general, they were classified confidential to keep that information unto ourselves until we were ready to release it, had it correlated, and so on.

Q. Well, it was the policy of the plaintiff, was it not, to keep the location of its installations and the location of its irrigation works and water-distributing systems more or less from the public for purposes of military security?

A. That was true during the war. However, the map which is on the board there, under the one exposed, I think that it is your exhibit now——

Q. A.

A. ——is a map which shows most of our installations, and is available for public sale, for public purchase. We have made no effort to conceal irrigation systems, and they are visible from the highway.

Mr. Dennis: I didn't get the last answer. I wonder if you would read it, please.

(The answer was read.)

The Witness (continuing): Nor have we concealed sewage plants, or anything of that kind. They are visible for all to see who pass that way.

Q. (By Mr. Dennis): Colonel, when you say these maps were for purchase, you are talking about the topo map? A. The basic map.

Q. Without the information which has been superimposed on the topo map?

A. That is correct.

Q. And, as I remember your testimony, the naval reservation, at least the southerly and easterly

(Testimony of Elliott B. Robertson.)

boundaries and the boundaries along the Highway 101, has been fenced?

A. My testimony was that the southerly and easterly boundaries were fenced at the points I have witnessed, and that the highway had not been fenced by the Government, but there appeared to be highway fences when we came there.

Q. But you do maintain signs, "Military Reservation" [870] and "No Trespassing," and so forth?

A. That is correct.

Q. And you have maintained patrols and denied access to the reservation to people generally, unless they had business on the reservation, at which time they had to secure permits to go and tell their place of business, and what they were going to do there?

A. It is reasonably easy to get on Camp Pendleton. The primary reason for those signs is to keep people from getting into the shooting areas and getting hurt. There is practically no limitation on access to visiting the living areas.

Q. When you say the installations and the irrigation systems and water-distribution systems are visible from the highways, you are referring to the highways within the boundaries of Camp Pendleton and maintained by Camp Pendleton, with the exception of such structures as might be visible from 101?

A. That is correct.

Q. Now, does Camp Pendleton maintain what is called a weekly muster roll?

A. I don't believe so. I think the muster roll went out of existence some time ago.

(Testimony of Elliott B. Robertson.)

Q. Well, what takes its place?

A. It used to be a daily muster roll. [871]

Q. What takes the place of what was known as a daily muster roll?

A. I am not informed on personnel administration. I could not answer.

Q. Well, Colonel, it is the policy, is it not, of the Marine Corps to keep accurate and permanent records as to where each man is billeted at all times, so that——

A. I have known of no effort to keep permanent records of where a man was billeted.

Q. At Camp Pendleton?

A. Or any place else.

Q. So that you have no records in Washington or at Camp Pendleton which would show where a particular man was billeted at any particular time?

A. I think we should come to an understanding as to what is meant by "billeted." I think that is the place where he sleeps, the building that he sleeps in.

Q. That is correct.

A. The records in Washington show by name where an individual is stationed, whether he is at Camp Pendleton or in Korea, or some other place. At Camp Pendleton the records are kept essentially, I believe, as to where or what unit he is attached to. His unit keeps track of where he is, of the squad room he is in, but it is not a permanent record in that respect, and when he goes, we forget him. [872]

Q. And are those records then destroyed?

(Testimony of Elliott B. Robertson.)

A. I assume so. I am not informed.

Mr. Dennis: I think that is all.

The Court: All right.

Mr. Shryock: Thank you very much, Colonel.

(Witness excused.) [873]

Mr. Shryock: I would like to say this, that Mr. Dennis asked Colonel Robertson if he knew where the Fallbrook gauging station was.

The Fallbrook gauging station is one of the six gauging stations which have figured prominently in this litigation. Mr. Dennis then stated that even he did not know or was not sure where it was, even though he proposes to divert water for his company almost exactly at the point of diversion of the Fallbrook diversion—Fallbrook Public Utility District.

Now I quite agree with Mr. Dennis that the location of the gauging station should be in the record but I feel that it should be in accurately.

Now if you wish us to produce a witness who can tell you where the gauging station is or if you will accept our statement that it is some yards below the point of the Fallbrook diversion, why, we can satisfy you on either count.

Mr. Dennis: I think that the location, Commander, of the Fallbrook gauging station has been definitely established. However, we have not established the method of diversion of Fallbrook or the location of their diversion point.

The only thing I want to get in the record is, is

Fallbrook at the present time diverting water above or below the Fallbrook gauging station.

Mr. Shryock: Are you able to answer that?

Mr. Dennis: I am not. I do not know whether they are [874] or are not at the present time because I do not know where the diversion is. I have seen the station but I have—or the diversion works, but I have not paid any attention and did not at the time I went there, to locate the works physically in relationship to the gauging station.

Mr. Shryock: I thought it was your contention that it would be advisable from the standpoint of the record to have that question answered.

Mr. Dennis: I think we should.

Mr. Shryock: Well, as I say, I can tell you that the Fallbrook gauging station is below the point of diversion.

Mr. Dennis: I am willing to accept your statement.

Mr. Shryock: Very well.

Mr. Dennis: I believe by the terms of the pre-trial order that the Santa Margarita Mutual Water Company was going to introduce in evidence a copy of its articles of incorporation and I believe that a copy has heretofore been delivered to Commander Shryock and I would like to introduce this in evidence as the defendants' next in order.

Mr. Shryock: No objection.

The Clerk: Is it admitted, your Honor?

The Court: Yes.

The Clerk: Defendants' Exhibit G in evidence.

(The document referred to was marked Defendants' Exhibit G and received in evidence.)

Mr. Dennis: I have here a copy of the by-laws of the Santa Margarita Mutual Water Company, a copy of which has been handed to the Commander and I would like to introduce this in evidence as Defendants' Exhibit H.

The Court: Received.

(The document referred to was marked Defendants' Exhibit H and received in evidence.)

Mr. Shryock: No objection.

The Clerk: Is this admitted, your Honor?

The Court: Yes.

Mr. Dennis: I have a certificate here from Frank M. Jordan, Secretary of State of the State of California, certifying that the Santa Margarita Mutual Water Company is a corporation and is incorporated under the laws of the State of California and that it is authorized to do business in the State of California. A copy of this has heretofore been handed to counsel for the plaintiff.

The Court: All right.

Mr. Dennis: Which I will introduce as Defendants' I.

The Clerk: In evidence, your Honor?

The Court: Yes.

(The document referred to was marked Defendants' Exhibit I and received in evidence.)

Mr. Dennis: I have letters, a copy—strike that. I have a copy of a protest which was filed by the United States of [876] America, the United States Navy, represented by the Commandant of the Elev-

enth Naval District to the application of the Santa Margarita Mutual Water Company, a copy of which has been heretofore handed to counsel for plaintiff and which I introduce in evidence as Defendants' Exhibit J.

The Court: Received.

Mr. Shryock: No objection.

(The document referred to was marked Defendants' Exhibit J and received in evidence.)

Mr. Dennis: I think in accordance with your Honor's suggestion that if there are any particular portions of an exhibit which counsel desires to call attention to they should do so at the time it is introduced.

This particular protest states that, and shows the number of acre-feet of water which have been used by Camp Pendleton, both for military and for agricultural purposes. For the year 1942 and 1943 and the years 1945 and 1946 it gives those figures.

It also shows the mean annual use of water for that period.

Mr. Shryock: Is there a date on that protest?

Mr. Dennis: I do not believe that the protest had a date. We do have the letter.

The Court: What is the filing date?

Mr. Dennis: There is no filing date on it. We have here the records of the Division of Water Resources and they have a letter which shows that that application or protest was [877] forwarded on—I will get that date in just a moment.

Mr. Shryock: It indicates it was received in

the Division of Water Resources on February 26, 1947, does it not?

Mr. Dennis: I think that is correct.

The Court: All right, that date is sufficient.

Mr. Dennis: And the last paragraph of that protest reads as follows:

“Until flash flood waters are controlled under a regulated water conservation and flood control program, such as is under the study by the Bureau of Reclamation, the Government must contest applications to appropriate water since appropriation will imperil the mission of Camp Pendleton as a military base and result in a permanent devaluation of Government land either for military or agricultural use.”

I also have a copy of the Navy's application to appropriate waters of the Santa Margarita River which was filed with the Division of Water Resources, the State engineer of the State of California, which was prepared by the Attorney General's office in co-operation with the Division of Water Resources, and copies of letters, one written by G. B. Erskine on the 13th of July, 1949, one written by O. T. Pfeiffer on the 3rd of November 1948 and the third letter written by G. B. Erskine on the 13th of September 1948 which amended the application filed by the Navy with the Division of Water Resources. [878]

I wish to offer the three letters and the application in evidence as the Defendants' next in order.

Mr. Shryock: Well, we don't object to them. We previously called attention to the fact that we

don't consider that this application has any relevance to these proceedings but we have no objection to their being offered.

The Court: Received.

The Clerk: Defendants' Exhibit K in evidence.

(The document referred to was marked Defendants' Exhibit K and received in evidence.)

Mr. Dennis: I also want to offer in evidence at this time two maps, one indicating or entitled: "Topographic Map of a Portion of Camp Joseph H. Pendleton and Fallbrook Naval Ammunition Depot, Eleventh Naval District, San Diego, indicating areas to be inundated by the proposed DeLuz dam on the Santa Margarita River."

And the other map is entitled: "A Map of Camp Joseph H. Pendleton, Fallbrook Naval Ammunition Depot and Naval Hospital, Santa Margarita Ranch, Oceanside, California, Eleventh Naval District, San Diego, California, water distribution system and proposed extensions," which maps were attached to the application of the Navy which is offered in evidence.

Mr. Shryock: And subject to the same comments which applied to the previous exhibits. We have no objection to them. [879]

The Court: All right.

The Clerk: Defendants' Exhibit L in evidence.

(The document referred to was marked Defendants' Exhibit L and received in evidence.)

Mr. Dennis: Would you mark them L-1 and L-2?

The Clerk: All right, L-1 and L-2.

(The documents referred to were marked De-

endants' Exhibits L-1 and L-2 and received in evidence.)

Mr. Dennis: At this time I wish to offer in evidence a copy of a protest filed by the United States Navy, represented by the Commandant of the Eleventh Naval District, to the application No. 11586 of the Fallbrook Public Utility District, which application gives pertinent data as to the amount of water which has been used for military and agricultural use for the period 1942 to 1943 and 1945 to 1946.

The Court: All right.

Mr. Shryock: No objection.

The Clerk: Defendants' Exhibit M in evidence.

(The document referred to was marked Defendants' Exhibit M and received in evidence.)

Mr. Dennis: And at this time I wish to offer a copy of the protest filed by the United States Navy, represented by the Commandant of the Eleventh Naval District, to the application 11518 of the Vail Company, together with a letter which accompanied—with which the application was forwarded. [880]

Mr. Shryock: No objection.

The Court: Received.

(The document referred to was marked Defendants' Exhibit N and received in evidence.)

Mr. Dennis: At this time I would like to call Mr. Caldwell.

The Court: I think we had better take a short recess before you call a witness.

(Short recess.) [881]

Mr. Dennis: Your Honor please, I notice I neglected to put in one exhibit.

The Court: All right.

Mr. Dennis: I have here the Fallbrook pretrial exhibit I, it is marked, which shows the amount of water which has been diverted by the Fallbrook Public Utility District from 1925 to 1952, which I would want to present in evidence as the defendants' next in order.

The Court: All right.

The Clerk: That is Defendants' Exhibit O in evidence.

(The document referred to, marked Defendants' Exhibit O, was received in evidence.)

The Court: All right.

Mr. Dennis: Mr. Caldwell.

Mr. Shryock: May I understand, then, that is the Santa Margarita Mutual Water Company's Exhibit I?

Mr. Dennis: No, that was Fallbrook's pretrial Exhibit I, and it will now be Santa Margarita Mutual Water Company's Exhibit O.

Mr. Shryock: You are adopting it as your exhibit?

Mr. Dennis: Yes.

DAVE LYNAM CALDWELL

called as a witness on behalf of the defendants, being first duly sworn, was examined and testified as follows: [882]

Direct Examination

The Clerk: What is your name, please?

(Testimony of Dave Lynam Caldwell.)

The Witness: Dave Lynam Caldwell.

Q. (By Mr. Dennis): Mr. Caldwell, what is your address?

A. It is Route 1, Box 148, Fallbrook.

Q. Do you have a business address?

A. That is the same address.

Q. You are president of the Santa Margarita Mutual Water Company? A. That is right.

Q. What is your business or profession?

A. At the present time I am a farmer. Previously, I have been occupied as a petroleum engineer.

Q. You had the ordinary grade school and high school education? A. Yes, sir.

Q. Following that did you attend any college or university?

A. Yes, I attended Stanford University, and received a degree in geology in 1922.

Q. And you are a registered petroleum engineer? A. That is right.

Q. From the time you graduated until approximately two years ago, you pursued your profession?

A. As a petroleum engineer, yes.

Q. In the course of your work, did you have occasion from time to time to prepare graphs?

A. Yes.

Q. At my request, have you prepared certain graphs which you have in your possession at this time? A. That is correct.

Q. Will you tell us, briefly, what documents you used in the preparation of those graphs?

(Testimony of Dave Lynam Caldwell.)

A. Yes. Exhibit No. 14 has the records of the U.S.G.S. gauges at the several gauging stations, and several exhibits that have been presented. Exhibit No. 26——

The Court: Just one minute. All right.

The Witness: Exhibit 26 shows the amount of water pumped at the Pendleton pumps.

Exhibit No. 27 shows the amount of water pumped at the Ysidora pumps.

Exhibit 28 shows the amount of water pumped by Vail Ranch.

Exhibit 7 shows the amount of water in storage at Lake Vail. [884]

Mr. Shryock: Now, the witness is referring to Plaintiff's Exhibits, is that correct?

Mr. Dennis: Plaintiff's exhibits, yes.

Q. (By Mr. Dennis): It is my understanding, Mr. Caldwell, that the graphs which you prepared were prepared from Plaintiff's Exhibits 26, 27, 28 and from the several schedules or tables which have been prepared by the plaintiff in answer to the written interrogatories of the Santa Margarita Mutual Water Company and which was subsequently introduced in evidence, is that correct?

A. Yes. I believe that one of those is called "Table 7, Sheet 1" and shows the amount of water used at Camp Pendleton.

Q. And I believe that you also obtained certain information, did you not, from the transcript of the proceedings and in particular certain testimony that was given by Colonel Robertson in respect to

(Testimony of Dave Lynam Caldwell.)

the number of men who were stationed and whom they anticipated would be stationed at Camp Joseph H. Pendleton? A. That is correct.

Mr. Dennis: I would like to offer at this time a graph entitled "Camp Pendleton Water Usage" as Defendants' Exhibit P, I believe it is, is it not?

Mr. Shryock: Let me see that, please.

(Document handed to Mr. Shryock.) [885]

The Clerk: Is this admitted, your Honor?

The Court: It will be received.

The Clerk: Defendants' P in evidence.

(The document referred to was marked Defendants' Exhibit P and received in evidence.)

Mr. Dennis: I would like to offer in evidence a graph entitled—which bears the legend: "Total Natural Flow of Santa Margarita River at Ysidora gauging station" as Defendants' Exhibit Q in evidence.

The Court: It will be received.

(The document referred to was marked Defendants' Exhibit Q and received in evidence.)

Mr. Shryock: Mr. Dennis, as you offer these will you be kind enough to have the witness identify them with the Plaintiff's Exhibit from which they were taken?

Mr. Dennis: Yes. I thought I would go into that as soon as they are in evidence. Do you want me to do it first?

Mr. Shryock: If you could mention that in passing. For example, Exhibit P, "Camp Pendleton Water Usage."

(Testimony of Dave Lynam Caldwell.)

Q. (By Mr. Dennis): Exhibit P, Mr. Caldwell, will you tell me how you acquired the information which is shown on that graph?

A. The information shown on that graph was obtained from Table 7 Sheet 1 which I understand is the answer to the interrogatory and also information obtained from Colonel Robertson's testimony. [886]

Mr. Shryock: We might add that that was Defendants' Exhibit D table 7.

Mr. Dennis: Yes.

Q. (By Mr. Dennis): Now, calling your attention to Defendants' Exhibit Q would you tell us where you obtained the information which you used in plotting that graph?

A. That information was obtained from Plaintiff's Exhibits 26 and 27 and from Exhibit No. 14.

Q. And also from Plaintiff's Exhibit 28?

A. Yes, Plaintiff's Exhibit 28 and Exhibit No. 7.

Q. Plaintiff's Exhibit No. 7? A. Yes.

The Clerk: Is Defendants' Exhibit Q admitted, your Honor?

The Court: It will be received.

Q. (By Mr. Dennis): Now calling your attention, Mr. Caldwell, to the next graph which at the top says: "Total natural flow of the Santa Margarita river." Will you tell us where you obtained the information which you used in plotting that graph?

A. That information was obtained from Exhibit 14 and from Exhibit No. 28 and Exhibit No. 7.

Mr. Dennis: I would like to offer this in evidence as [887] Defendants' next in order.

(Testimony of Dave Lynam Caldwell.)

The Court: Received.

The Clerk: Defendants' Exhibit R in evidence.

(The document referred to was marked Defendant's Exhibit R and received in evidence.)

Q. (By Mr. Dennis): Now, Mr. Caldwell, calling your attention to the graph which is entitled "Vail water data," will you tell us where you obtained the information which you used in plotting that graph?

A. The information was obtained from Plaintiff's Exhibit No. 14 and Plaintiff's Exhibit No. 28 and also from testimony by Mr. Hall. [888]

Mr. Dennis: I would like to offer this graph next in evidence as defendants' next in order.

The Court: It may be received.

The Clerk: That is Defendants' Exhibit S.

(The document referred to, marked Defendants' Exhibit S, was received in evidence.)

Q. (By Mr. Dennis): Now, Mr. Caldwell, calling your attention to the graph which is entitled "Camp Pendleton Water Data," will you tell us where you obtained the information which you used in plotting that graph?

A. It was obtained from Exhibits Nos. 14, 26, 27, 28 and 7; also Exhibit No. 38, I believe. I will have to check on that. Yes, Exhibit No. 38.

Mr. Dennis: I would like to offer this graph as defendants' exhibit next in order.

The Clerk: Is this admitted, your Honor?

The Court: It may be received.

The Clerk: Defendants' Exhibit T in evidence.

(Testimony of Dave Lynam Caldwell.)

(The document referred to, marked Defendants' Exhibit T, was received in evidence.)

Q. (By Mr. Dennis): Now, Mr. Caldwell, calling your attention to the first graph, which was introduced in evidence as Defendants' Exhibit P, will you tell us what that graph represents?

A. That shows the amount of water used at Camp [889] Pendleton in the years 1943 through 1951. That is plotted in green crayon. Also, the number of individuals at the camp, as testified to by Colonel Robertson, which is colored in orange-yellow. And the lower graph, colored in blue, shows the number of individuals per acre-foot of water used.

Q. The figures on the left-hand side represent the number of individuals stationed at Camp Pendleton?

A. Yes.

Q. And the figures on the right-hand side show the amount of water used by Camp Pendleton in terms of acre-feet per year?

A. That is right.

Q. And the small scale in the lower right-hand corner is placed there to show the number of acre-feet required to service a certain designated number of individuals?

A. That is correct, except that it is plotted in individuals per acre-foot.

Q. Now, Mr. Caldwell, calling your attention to Defendants' Exhibit Q, do you have that in front of you?

A. Yes.

(Testimony of Dave Lynam Caldwell.)

Q. Will you tell us what the figures and lines which are shown on that graph represent?

A. The lower graph shows the amount of water used at Camp Pendleton during the water years 1942-43 up to the latest information we have for this year. That is colored [890] in purple. And the other graph shown is the total natural flow of the Santa Margarita River at the Ysidora gauging station, including Camp Pendleton and the Ysidora pumps, as shown by Exhibits 26 and 27, and the water pumped by Vail Ranch, Exhibit 28, and the water stored by Lake Vail, which is Exhibit 7.

Q. In other words, the line which is colored in green, and which has an arrow indicating it is the total natural flow of the Santa Margarita River, was obtained by adding to the records maintained by the gauging station for each month the amount of water which the plaintiff claims to have used from the Santa Margarita River, as shown by Exhibits 26 and 27, plus such water as the Vails may have extracted, as shown by Exhibit 28, plus such water as may have been stored by the Vails, as shown by Exhibit 7?

A. That is correct.

Q. And, as I understand, the purple line represents the amount of water which was pumped or diverted from the Santa Margarita River by means of pumps, as shown by their Exhibits 26 and 27?

A. That is right.

Q. And the figures on the left-hand side indicate the number of acre-feet?

Q. That is right.

(Testimony of Dave Lynam Caldwell.)

Q. And the letters which appear above the water years [891] represented by the figures "1947-48" stand, reading from left to right, for October, November, December, January, February, March, April, May, June, July, August, and September; is that correct? A. That is correct.

Q. Now, Mr. Caldwell, calling your attention to Defendants' Exhibit R, will you tell me what the figures and lines on that graph represent?

A. The lower graph there, colored in dark red, represents the water pumped by the Vail Ranch. And the upper graph, colored in green, shows the total natural flow of the Santa Margarita River at the Railroad Canyon gauging station, including the water that was pumped by Vail Ranch and the water stored at Lake Vail.

The figures in the left-hand margin show the scale in acre-feet, and the same representation, with respect to the months of the years that are shown, as on the preceding graph.

Q. The purple line, then, on the bottom shows the total water pumped by Vail, as shown by Plaintiff's Exhibit 28; is that correct?

A. That is correct.

Q. And the green line represents the purported flow at the Railroad Canyon gauging station, plus the water which was extracted by Vail by the means of pumps, as shown by [892] Plaintiff's Exhibit 28, plus such waters as were stored by Vail in the Vail reservoir, as shown by Plaintiff's Exhibit 7?

A. That is right.

(Testimony of Dave Lynam Caldwell.)

Q. And I believe that you have indicated on the graph the point of time at which the gates were closed at the Vail dam and the first water was stored there, which was in December, 1948, according to the testimony in this case.

A. That is right.

Q. Now, Mr. Caldwell, calling your attention to the graph which is in evidence as Defendants' Exhibit S, will you tell me what the figures and the lines on that graph represent?

A. The graphs on this chart show the monthly averages arrived at from Exhibit R. Shown, again, on the left-hand margin is the scale in acre-feet and the months of the year, starting with October 1st and ending September 30th.

The lower graph, colored in green, shows the average monthly water pumped by Vail Ranch, which is obtained by taking the amount of water shown on Exhibit No. 28 for each month, and dividing it by the number of months. I believe that was for a 25-year period.

The middle graph, colored in red, shows the total natural flow, and the average monthly acre-feet, which was also taking from the values shown in Exhibit R. [893]

Q. Exhibit 14?

A. Which would be obtained from Exhibit No. 14. And the graph colored blue shows the prospective use of water for the Vail ranch as testified to by Mr. Hall as a total of 79,514 acre-feet per year, which is a figure furnished by Mr. Hall and I took

(Testimony of Dave Lynam Caldwell.)

the same percentages that were shown monthly over the 25-year record on Exhibit No. 28 and applied those same monthly percentages to the total of 79,514 to arrive at the figure for each month.

Q. And I believe that the figure of 22,053 acre-feet which appears after the words "total natural flow", represents the average annual natural flow for the 24 and 25-year period which you used?

A. That is correct. That is the summation of the individual monthly average figures.

Q. Now, Mr. Caldwell, calling your attention to Defendants' Exhibit T, will you tell us what the lines and figures on that graph represent?

A. This graph represents the monthly average taken from Exhibit Q. The lower line colored in green represents the average monthly amount of water used at Camp Pendleton as shown by the table 7 sheet No. 1.

The second line colored in orange-red shows the average monthly usage of water at Camp Pendleton as shown by a combination of Exhibits 26 and 27. [894]

The graph colored in purple shows the average monthly flow of the river at Ysidora station between the years 1924 and 1951 as determined from Exhibit No. 14.

The upper graph outlined in blue is the average monthly flow including the diversions by Pendleton pumps as shown by Exhibit 26, and the Ysidora pumps as shown by Exhibit 27 and the Vail

(Testimony of Dave Lynam Caldwell.)

pumps as shown by Exhibit 28 and by the Vail storage as shown by Exhibit 7.

Q. Now will you give us what the line, which is kind of yellow-orange and has an arrow showing prospective agricultural demand represents?

A. That is the graph showing the monthly figures as furnished in Exhibit No. 38 showing the prospective agricultural demand to be a total of 69,231 acre-feet per year.

Q. So that the line which is a purple-red or purple line, which is flow measured at Ysidora station, represents the actual recorded flow over the period, the actual average—strike that, please.

That line represents the average monthly recorded flow at the Ysidora gauging station?

A. That is right.

Q. And the line which is in blue represents what the actual recorded flow would have been had not the Vails or the O'Neills diverted the water which is represented by Exhibits 26, 27, 28 and 7? [895]

Mr. Shryock: Could I have that question read, please?

(Question read.)

The Witness: That is correct with the qualification that the total natural flow of the river would presume to include the diversions of the Fallbrook Public Utility District and the Naval Ammunition Depot and the hospital.

Q. (By Mr. Dennis): You didn't take those into consideration? A. No.

(Testimony of Dave Lynam Caldwell.)

Q. And you didn't take into consideration any evaporation losses at the Vail dam?

A. No, nor any diversions from the river through O'Neill ditch.

Q. And you did not take into consideration any foreign water that may have been discharged into the basin by reason of sewage effluent which had been pumped into the basin by the plaintiff?

A. No, no figures of that nature were included.

Mr. Dennis: That is all.

Cross Examination

Q. (By Mr. Shryock): Mr. Caldwell, as I understand it then all of these exhibits are based on exhibits which have been furnished by the plaintiff or a table accompanying answers to interrogatories which were adopted by the defendant as an exhibit, plus [896] certain testimony in the record which I understand you have examined?

A. That is correct.

Q. And in a sense we may say that all of these exhibits are mere transpositions into other forms of information which is already before the court, is that correct?

A. That is correct.

Q. And do you feel, Mr. Caldwell, that these exhibits are reasonable accurate—that is that they do reflect the information taken from the plaintiff's exhibits and that they are produced with reasonable accuracy?

A. That is correct.

Q. Let us examine Defendants' Exhibit P for a moment. Now, I believe, sir, in describing the sources of information for that exhibit you stated

(Testimony of Dave Lynam Caldwell.)

that you looked at sheet No. 1, table 7, of the answers to interrogatories, is that correct?

A. Yes.

Q. Which was Exhibit D together with Col. Robertson's testimony? A. That is correct.

Q. And did you examine all of Colonel Robertson's testimony? A. No, I did not.

Q. Well, how much of it did you examine? [897]

A. The portion that recited the number of men in the camp during the years that are shown on the graph.

Q. Well, do you believe, for example, that you looked at page 669 of the record where Colonel Robertson made the following statement:

"I examined the records at headquarters and determined that the population at its peak was approximately 56,000 military." Did you examine that, do you recall?

Mr. Dennis: Just a second until we get the correct volume.

Mr. Shryock: Volume 6.

Mr. Dennis: Yes.

(Document handed to the witness.)

Mr. Shryock: Perhaps your page may be different from mine. Yes, that is right. Do you recall having examined that portion of the record of Colonel Robertson's testimony?

The Witness: With reference to the peak of 56,000?

Q. (By Mr. Shryock): Yes, the sentence which you are now reading.

(Testimony of Dave Lynam Caldwell.)

A. Yes, I am trying to see if it shows there what year that was.

Q. And later I asked the Colonel, and that would have been during one of the years 1943-1944 or 1945, to which the answer was: [898]

"It was late 1944."

The Court: I think he was testifying as to the peak.

Mr. Shryock: Yes.

The Witness: I see I have a figure plotted on here.

Q. (By Mr. Shryock): I asked you did you examine that part of Colonel Robertson's testimony when you were preparing Exhibit P?

A. I believe so. I know I read through the part that recited the number of men that are shown in the camp here and I don't see the other figure. It appears that it was plotted on the graph, 56,000 and was taken into consideration.

Q. Well then, returning to Exhibit P. The yellow line which purports to indicate the number of individuals at Camp Pendleton during the years '43 to '52, is it not correct that the peak you reach in 1944 is some 40,000 individuals?

A. Yes, the peak shown on the graph is 40,000.

Q. Does the figure of 56,000 make any difference in your approach to the orange line you have graphed in there?

A. Yes; it would make a difference. That should be shown definitely to be a higher point on the graph than what has been depicted here.

(Testimony of Dave Lynam Caldwell.)

Mr. Shryock: Thank you very much, Mr. Caldwell.

Redirect Examination

Q. (By Mr. Dennis): Mr. Caldwell, in preparing the line which is yellow, did you use the peak figures for the year, or did you use the figures which Colonel Robertson testified to were the average for the year?

A. Let's find that in the testimony here.

Mr. Shryock: Well, isn't the witness able to answer what he used?

The Court: Evidently, he isn't. He wants to know what the Colonel testified to, but he is asking as to whether you, in making the graph, took the 40,000 to be the average figure.

Q. (By Mr. Dennis): Calling your attention, Mr. Caldwell, to page 680, will you say whether those are the figures which you used in preparing the graph?

A. This appears to be it, page 681, where it shows the average for 1943 to be 25,000, and the average for 1944 would be between forty-five and fifty thousand, and the average for 1945 would be 28,000. And then, as to those [900] figures, as I recall it, there was something testified as to the number of civilians that were also included.

The Court: That still does not answer the question as to the average you used.

Mr. Dennis: I think the witness just stated that he used the figures which appear on page 680 in preparing the chart.

(Testimony of Dave Lynam Caldwell.)

The Court: And did not use the average?

Mr. Dennis: I think you would have to read Colonel Robertson's testimony, that those were average figures. However, I don't think the witness knows whether they were average or peak figures. He used those figures in preparing the graph.

The Court: All right. Anything further?

Mr. Dennis: That is all.

Recross Examination

Q. (By Mr. Shryock): Now, suppose we read this to you, Mr. Caldwell, as long as we are taking Colonel Robertson's average figures, at page 682:

"Q. Now, for 1944 have you an estimate?

"A. An average would be between forty-five and fifty thousand, and a peak of 56,000 military." That is at lines 4 and 5. Is that one of the averages that you referred to?

A. As I said before, here it appears that the figure [901] shown for 1944 is not shown correctly. It is shown at 40,000, and the average shown here by Colonel Robertson is 56,000. That would have the effect of showing a better utilization of water than what is actually shown on the lower graph, which is the important part of the study. That shows that the use of water at that time was very efficient, during the first years of the camp, and it would be even more efficient than is shown on the lower graph.

Mr. Shryock: I am sure we appreciate that compliment, Mr. Caldwell.

The Court: All right.

Mr. Shryock: Your Honor please, may I say that I seriously doubt whether we shall have much more recross examination, but I should like to point out the fact that these five exhibits, which contain a considerable amount of detail, have just this moment been submitted to us, and we should appreciate the privilege of examining them in a little more detail during the noon hour.

The Court: I will tell you that while you are trying this case our mutual friend—and I say “mutual friend” without tongue in cheek, because Phil Swing and I have been friends for many years—is giving me trouble, as I have just received from Washington a letter from the Attorney Geenal, with all sorts of documents which I have to sign and see that they get to the Court of Appeals. If Mr. Swing [902] were here, I could serve him with his copy and save us the trouble of filing an affidavit of service in serving it by mail, but he is not physically present at this time. So I will have to busy myself at this hour in getting these things out, because Friday is the 21st. So I have no objection to taking our recess now, and if at 2:00 o'clock you want to recall the witness for further cross examination, that will be all right.

Mr. Dennis: I have no objection to that.

Mr. Shryock: All right.

(Whereupon, at 12:03 o'clock p.m., Wednesday, November 19, 1952, a recess was taken until 2:00 o'clock p.m. of the same day.) [903]

Wednesday, November 19, 1952, 2:00 p.m.

Mr. Dennis: Mr. Caldwell, will you resume the stand?

DAVE LYNAM CALDWELL

having been previously sworn, resumed the stand and testified as follows:

Cross Examination—(Continued)

Q. (By Mr. Shryock): Mr. Caldwell, will you refer to—I take it, your Honor wants us to begin.

The Court: Yes, sure.

Q. (By Mr. Shryock): Will you refer to Defendants' Exhibit R and——

A. I have Exhibit R.

Q. ——and the green line is the top line shown on that exhibit, is it not? A. Yes.

Q. And that is entitled "Total natural flow of Santa Margarita River at Railroad Canyon gauging station," and underneath: "Includes water pumped by Vail Ranch and waters stored at Lake Vail."

Now of course, before Lake Vail was in existence, that would not be applicable, that last comment, would it? A. That is right.

Q. But as to that portion of the green line up until [904] the end of the 1940's the figures included there were taken from Plaintiff's Exhibit 14, which were the U.S.G.S. records of flow at that gauging station, is that correct?

A. I don't follow you. At first you said something about to the end of 1940.

(Testimony of Dave Lynam Caldwell.)

Q. Well, in other words, prior to Lake Vail?

A. Yes.

Q. In order to arrive at the figures which you gave us your green line included, first, the flow shown by the gauging station at Railroad Canyon, is that correct? A. That is right.

Q. And then you included water pumped by the Vail Ranch which you obtained from Plaintiff's Exhibit 28, is that correct?

A. Yes, sir, that is right.

Q. And adding those two you got the total figure which you represented by the green line?

A. To represent the total natural flow of the river.

Q. Total natural flow at that point, at the gauging station? A. That is right.

Q. Did you make any deduction for returned water in making that computation?

A. No, there was no deduction made for any returned water.

Q. And yet the water pumped by the Vail Ranch was in some instances a very considerable percentage of your total [905] figure, was it not?

A. That is right.

Q. And returned water is certainly a matter for consideration in figuring sources of water, is it not? A. I don't know as to that.

Q. You are not familiar with that?

A. No.

Q. With returned water in irrigation practice?

A. I am familiar with the term but I wouldn't

(Testimony of Dave Lynam Caldwell.)

know as to how much returned water there was in this instance.

Q. Well, if for example let us say one out of——

Mr. Dennis: May I ask a question? There has been no evidence in this case that there is any returned water from either the Vails or from the Government pumping other than the sewage effluent which is pumped over into the basin. Am I correct on that?

Mr. Shryock: I am not so sure there hasn't been. There is evidence that there is extensive irrigation on the Vail lands.

Mr. Dennis: But I don't believe anybody the Government introduced, introduced any testimony to the effect there was any returned water.

Mr. Shryock: Well then, again let me——

The Court: I don't think it has been measured but I think there are facts from which you can infer that some of [906] this water used for irrigation is returned to the basin.

Q. (By Mr. Shryock): And then just to make it clear, no part of any possible returned water from the Vail use for irrigation was deducted from your total figure of natural flow at the gauging station? A. That is right.

Q. And if that is true then, of course, it would be equally true, would it not, at least equally true for Exhibit Q, namely, the natural flow at the Ysidora gauging station? A. Yes.

Q. Because that would include no return water

(Testimony of Dave Lynam Caldwell.)

from the Vails and no return water from anywhere else, would it?

A. That is right.

Q. And would not the same comment in effect apply, if you will look at Exhibit T, to the blue line showing the total natural flow at Ysidora station including Pendleton pumps, Ysidora pumps, Vail pumps and Vail storage?

A. It is true with a modification that might be made with respect to Vail storage and that should have been pointed out on the previous exhibit because that is involved in Exhibit R as well as in Exhibit T—that during the period of years that the Vail dam was storing water in Lake Vail there were 11 months in which instead of being a gain in the water stored behind the dam there was a loss in water and it was presumed that that was water that was released from Lake Vail and those figures were deducted from the total natural flow of the river as shown on Exhibit R and also on Exhibit T.

Q. Now, does Exhibit T purport to cover that same period of 20-odd, almost 30 years, reflected in Exhibits Q and R? I beg your pardon. The ten years from 1942 on reflected in Exhibits Q and R?

A. Well, the 10 years are reflected, also the additional period of time that we had readings on the total flow of the river as gauged by the U.S.G.S. and the period of time that we had readings on the water pumped by Vail. [908]

Q. And in those exhibits the Vail dam is a fac-

(Testimony of Dave Lynam Caldwell.)

tor in only the last two or three years; isn't that correct? A. Yes.

Q. Mr. Caldwell, did I understand that you are the president of the defendant Santa Margarita Mutual Water Company? A. Yes.

Q. Did you participate in any way in the decision to make an application for 60 cubic feet per second for your company—an application to the State for a permit to divert 60 cubic feet per second from the surface flow of the stream?

A. No, I have been a director of the Santa Margarita Mutual Water Company since that time.

Q. You mean you played no part in making that decision? A. That is right.

The Court: You mean you became a director after that, since that time?

The Witness: Yes.

Mr. Shryock: No further questions.

Redirect Examination

Q. (By Mr. Dennis): Mr. Caldwell, during the noon recess did you have a chance to check the record and ascertain what figures were used in connection with plotting the curve which was shown on Defendants' Exhibit P? [909]

A. Yes, I had a chance to check that, and found there was that one mistake.

Q. Will you explain to the court and to counsel what figure you used, and how you obtained that figure?

A. Yes. The figure that should have been plotted

(Testimony of Dave Lyman Caldwell.)

for 1944 was the figure recited on page 682, line 4, which showed the average usage was forty-five to fifty thousand acre-feet, and we used the 50,000 figure in recalculating it, and it results in an average usage of 20.2 individuals per acre-foot instead of 16.2, as shown.

Q. Will you tell how you obtained the other figures which are shown on that graph?

A. Yes. Starting with the year 1943, the figure shown there was obtained from page 681, line 17, of 25,000 individuals. From the year 1945—

Q. Will you now also tell the court where you obtained that figure? I mean the page number and the line.

A. At page 682, line 7, it shows 28,000 military men, and on the same page, at line 10, it shows 1,800 dependents, or 29,800 total, and that is the figure that was plotted.

In the year 1946, on page 682, line 13, it was stated that there were 11,000 military men and 2,200 dependents. That latter figure is shown at page 682, line 11. That makes a total of 13,200, which figure was plotted.

In the year 1947, on page 682, line 15, there is recited [910] 13,000 men, and, on line 11, 2,200 dependants, or a total of 15,200.

For the year 1948, at page 682, line 17, it shows 13,000 men, and at line 11 shows 2,200 dependents, a total of 15,200, the same as for 1947. Both of those figures are plotted for those two years.

(Testimony of Dave Lyman Caldwell.)

For the year 1949, on page 682, line 19, it shows the figure of 19,000 military men, and at page 683, line 8, it shows 2,550 dependents, or a total of 21,550, which figure was plotted.

For the year 1950, on page 682, line 22, it shows a total of 24,000 military men, and at page 683, line 8, it shows 2,550 dependents, or a total of 26,550, which figure was plotted.

For the year 1951, at page 682, line 24, it shows 28,000 men, and on page 683, line 8, it shows 2,550 dependents, or a total of 30,550, and that figure was plotted.

For the year 1952, on page 683, line 5, it shows a total of 53,000 men, and on the same page, line 8, it shows 2,550 dependents, or a total of 55,550. And I see that is marked on the chart as 55,250, so that should read 55,550, which is essentially the same figure that is plotted.

Q. Mr. Caldwell, have you ever had occasion to testify in a court of law before? A. No.

Mr. Dennis: That is all.

Recross Examination

Q. (By Mr. Shryock): Mr. Caldwell, are you now telling us that your figure of 40,000 for the year 1944 is correctly plotted, and that you do adopt it, and that you base it on line 4 of page 682?

A. No. I said that on page 682, line 4, is shown an average of 45,000 to 50,000 men, and that the 50,000 figure should properly be plotted on there, and I have changed it on this graph to read

(Testimony of Dave Lyman Caldwell.)

"50,000," and that changes the average individuals per acre-foot from 16.2 to 20.2.

Q. You were in error on that?

A. Yes, I was in error.

Mr. Shryock: All right, sir. Nothing further.

Mr. Dennis: That is all.

The Court: All right, Mr. Caldwell.

(Witness excused.)

Mr. Dennis: Your Honor please, at this time I want to offer in evidence the application of the Santa Margarita Mutual Water Company, Application No. 12152, as defendants' exhibit next in order. I believe it is U.

The Court: All right.

The Clerk: Exhibit U in evidence.

(The document referred to, marked Defendants' Exhibit U, was received in evidence.)

Mr. Dennis: I also want to offer in evidence Application No. 11578, which is an application by the Santa Margarita Mutual Water Company, as Defendants' Exhibit V.

The Clerk: Is this last admitted, your Honor?

The Court: It may be received.

The Clerk: That is Defendants' Exhibit V in evidence.

(The document referred to, marked Defendants' Exhibit V, was received in evidence.)

Mr. Shryock: And those two exhibits, Mr. Dennis, are the ones listed on page 67 of the pretrial order——

Mr. Dennis: I believe so, yes.

Mr. Shryock: —as Exhibits B and C of the Santa Margarita Mutual Water Company?

Mr. Dennis: Yes. I have here the affidavit of Max Bookman, who states that he is the Enigneer-in-charge of the Southern California Office of the Division of Water Resources of the Department of Public Works of the State of California; that he has examined the official files of the Division of Water Resources relating to Applications 11578 and 12152 of Santa Margarita Mutual Water Company and Application 12576 of the U.S. Navy Department to appropriate unappropriated water, and finds that said applications are still pending before the Division of Water Resources and are in active status.

That official action of the Division of Water Resources [913] with respect to said applications is being postponed pending the decision of the United States District Court for the Southern District of California in the case of United States of America vs. Fallbrook Public Utility District, et al., No. 1247-SD Civil.

The Court: All right. [914]

Mr. Dennis: I think that plaintiff has agreed we can stipulate that if Mr. Bookman (phonetic) was called he would so testify.

Mr. Shryock: We will so stipulate.

The Court: All right.

Mr. Dennis: I will introduce the affidavit as our next exhibit in order.

The Court: It may be received.

The Clerk: Defendants' Exhibit W in evidence.

(The document referred to was marked Defendants' Exhibit W and received in evidence.)

Mr. Dennis: There is just one other thing before I call Mr. Conkling.

I believe that counsel for plaintiff and myself have agreed that we can stipulate that when Colonel Robertson was testifying at page 676, line 25 to line 5 on page 677, that wherein he used the word "Camp Pendleton" he was referring to all of the military reservation—the United States Naval Ammunition Depot and United States Naval Hospital and Camp Joseph H. Pendleton in its entirety, is that correct?

Mr. Shryock: That is correct, we can so stipulate?

The Court: All right.

Mr. Dennis: And I would at this time like to offer in evidence a copy of the rules and regulations and information pertaining to the appropriation of water in California, being [915] a portion of the California Administrative Code, Title 23, Waters.

The Court: All right, it may be received.

The Clerk: Defendants' Exhibit X in evidence.

(The document referred to was marked Defendants' Exhibit X and received in evidence.)

Mr. Dennis: Mr. Conkling.

HAROLD CONKLING

called as a witness by the defendants, being first sworn, was examined and testified as follows:

The Clerk: State your full name.

The Witness: Harold Conkling.

(Testimony of Harold Conkling.)

Direct Examination

Q. (By Mr. Dennis): Mr. Conkling, where do you reside?

A. In Los Angeles, California.

Q. And do you have a business address?

A. Yes, 448 South Hill, Los Angeles.

Q. And what is your business or profession?

A. I am a consulting engineer, specializing in water matters and especially hydrological matters.

Q. Now, you have a grade school and high school education? A. Yes, I do.

Q. And following that did you attend a university or [916] college? A. Yes, I did.

Q. And what college did you attend and what did you specialize in?

A. I took a civil engineering course at the University of Nebraska and at Cornell University in New York.

Q. And after you left college what did you do?

A. Well, after a few years of what you might call a journeyman engineer I got a job with the United States Reclamation Bureau in Boise, Idaho, and was with the Reclamation Bureau for 11 years—that is until the fall of—until the spring of 1921, at which time I resigned and came to California and got a job with the State Division of Water Rights, which was later amalgamated with the State Engineer's office and became the Division of Water Resources.

I remained in the State service until May, 1945, at which time I left the service and established

(Testimony of Harold Conkling.)

an office as consultant in Los Angeles and I am still active in that.

Q. Did you say 1945?

A. 1945, yes.

Q. And what were your duties while you were with the Reclamation Bureau?

A. Well, they were various and sundry but finally in the latter years that I was with them I was in charge of general investigations for development of entire stream systems. At that time, when I first went with them, they [917] took isolated projects but after I had got into the investigational work it was found necessary to take entire stream systems before you could conveniently and economically lay out a project and that was my work during the latter years.

In that period I investigated and made a general plan for the development of the Humboldt River in Nevada and for the North Platte River in Colorado, Wyoming and Nebraska, and the upper Rio Grande. That wasn't definitely a plan but it pointed to a plan.

And here in California the development of the waters of Mono Basin to bring it through the range, the divide into Owens Valley for utilization for irrigation in Owens Valley.

I made the studies on the Colorado River which were embodied in the Fall-Davis Report, which was published as Senate Document so and so, and which was used for the Colorado River compact, which was later developed on that basis.

(Testimony of Harold Conkling.)

Then I did other work but the work that most closely ties into this present or in this particular irrigation project here on the Santa Margarita is that which I have outlined.

Q. Now, while you were with the State what did your duties principally consist of?

A. When I came with the State and from 1921 to 1927, I was on the investigation of large projects which were before the State and the Federal Power Commission for the development of power projects primarily in the Sierra Nevada Mountains and [918] then I made this, or, started this investigation of the San Gabriel River which was in connection with an application by the City of Pasadena to appropriate from the San Gabriel River, which embodied the usual difficulties in determining how much water belonged to the prior rights, due to percolation from the river and how much could be diverted.

The city finally gave up the project.

Then in 1927 I was appointed chief of the Division of Water Rights in charge of the water rights in the state—that is, in charge of the applications to appropriate water and also of the adjudications.

In 1929, as I say, the Division of Water Rights was amalgamated—united with the State Engineer's office and I became deputy state engineer.

From then on until I resigned I was in charge of some of the statewide investigations for development of projects and also handled 31 adjudications of stream systems, mainly in the north but one in

(Testimony of Harold Conkling.)

Southern California. That was the Raymond Basin investigation which was the case of Pasadena versus Alhambra, et al., and had to do with the adjudication of underground water rights and which in its fundamental features partakes a good deal of the nature of this—any one of these ground water basin projects like the Santa Margarita River.

Then I had charge of snow surveys and got out a lot of bulletins, some of which I wrote myself, the San Gabriel [919] investigation and so on.

There was a lot of work in conjunction with the Government—especially the organization which is now called the Soil Conservation Service on getting the consumptive use of the different crops and of the different types of native vegetation for the development of the—oh, the best development and most methodical development of these combination surface and underground water supplies and, well, this in a general way.

I might say that in Southern California here in connection with that we spent a good many years under an appropriation which was promoted by the Chamber of Commerce and others in Southern California, toward an intensive investigation of the underground basins of Southern California and their best utilization and how we could make the most out of them.

Do you want me to go on? I don't want to say anything more about that.

Q. Well, when you mentioned that you handled

(Testimony of Harold Conkling.)

the adjudication of stream systems, what were your duties in connection with that?

A. In the water code the Division of Water Resources is authorized to obtain the facts as to a stream system or as to any kind of a court action if it is referred to them by the court, or under another procedure, it being on petition of a certain percentage of the water users on a stream system [920] and then start obtaining those facts itself and lay them before the court after they have obtained it. That latter is called the statutory procedure and the other is called the court reference procedure. The methods seem to be quite salutary because in practically all cases when it went to the court it went to—when these cases went to court they went to court with a stipulated judgment as to all the water rights.

I don't mean to imply at all that the State does any of the adjudicating but it does and did develop the facts in a comprehensive manner in these cases.

Q. Now, have you had an opportunity to, or, have you during the course of your professional career had the opportunity of investigating or in making any reports on any streams in Southern California which are located in what is generally known as the Southern California coastal basins?

A. Yes. I have done quite a lot of work as represented by the Santa Ynez District upon the Santa Ynez River in Santa Barbara County in connection with the development of Cashuma (phonetic) reservoir by the United States Reclamation Bureau, which proposes to take water from the Santa Ynez

(Testimony of Harold Conkling.)

watershed through the mountains, Santa Ynez Mountains, Santa Ynez mountain range onto the coastal plain—Santa Barbara and Carpinteria and in through there.

That, of course, aroused considerable fear on the part [921] of the water users lying below the reservoir which in this case is almost all the water users in the basin.

The Reclamation Bureau together with myself worked out a plan by which the local water users could be relieved of any fear that they wouldn't get the water that belonged to them naturally.

And I am talking now of my work since I left the State service.

I laid out a comprehensive plan in Ventura County for the development of the Santa Clara River watershed which is the largest watershed in the County and also the Ventura River watershed, which is the watershed which drains Ojai Valley and comes down through the City of Ventura.

In each one of those cases, but more particularly in the Santa Clara, the project as developed and which is to be voted on for a bond issue in December was to build a reservoir upon one of the larger tributaries of the river and then store that water until it could be released and put underground further down in the valley, which is something, as I understand it, as is proposed in this case by Camp Pendleton.

With the other streams in Southern California I have become very familiar in other work since

(Testimony of Harold Conkling.)

then—since I left the State and in work which I did before I left the State.

At the present time I am working on an investigation on the Santa Ana River in the upper basin—that is in Riverside [922] and San Bernardino Counties to find out whether they can augment their water supply from local sources or must come into the Metropolitan Water District. [923]

Q. Have you had an opportunity to make investigations or supervise investigations of other underground water basins in Southern California and in the San Diego basin?

A. For adjudication?

Q. No, just investigation.

A. Every underground basin in Southern California, except all of the San Diego basin. Yes, the entire Southern California area has been under my investigation, intensive investigation.

Q. Does that include what is commonly known as the West basin?

A. Oh, the West basin, that is a part of this general area. Since I left the State, I did make—I would hardly call it an investigation because I knew all about it beforehand, but I made a report for the West Basin Association, which was advisory as to whether they should try to get a supplemental supply of water. That is the area around Santa Monica southward along the coast to Long Beach.

Q. And have you from time to time been the author of certain bulletins which have been pub-

(Testimony of Harold Conkling.)

lished by either the State or the Federal Government?

A. Well, I have several bulletins published by the State. None published by the Federal Government. I have this report on the San Gabriel investigation, the Ventura County investigation, the Mojave River investigation, the [924] Salinas Valley investigation, and some others possibly by myself. Those are investigations in which we had to determine the general plan for the water supplies.

Q. Have you been in charge of investigations and supervised reports which have been written by subordinates, which have been published by the State of California? A. Yes.

Q. Can you give us a few of the principal ones?

A. Oh, the Santa Ana investigation, the Santa Clara County investigation, several bulletins on this general Southern California, which we call the South Coastal basin, and, also, as a representative of the State, worked with, or at least represented the State on bulletins which were written by government agencies but published by the State, having to do with this general subject, in Southern California entirely.

Q. I wonder, Mr. Conkling, if you could give the names of several of your important clients that have utilized your services.

A. Well, the City of Los Angeles Department of Water and Power, in trying to find a way to utilize the San Fernando Valley as an underground reservoir, which I think we are, for a terminal

(Testimony of Harold Conkling.)

storage, importing water in, if necessary, for better and more logical development of the local supply. The West Engineer Department of Central [925] California; the Santa Ana Water Association; the State Division of Water Resources; Santa Clara Water Conservation District; Ventura County; Ventura County Flood Control; California River Board, State of California, and that was in connection with this Arizona project; San Bernardino Valley Water Conservation District; City of San Bernardino; Southern California Edison Company; City of Sierra Madre; and so on.

Q. Did the United States Department of Justice ever employ you and utilize your services?

A. Oh, yes. Upon the San Joaquin River, in connection with certain suits, what they call the Gerlach suits, brought against the Government for damages, and also at the present time I am on this Rank vs. Krug, representing the Federal Government in that suit. That is on the San Joaquin River, too, and has to do with percolation, primarily, on the San Joaquin River.

Q. Have you ever had occasion to testify in a court of law as an expert witness?

A. Yes. I testified—I represented the State of New Mexico before the Supreme Court of the United States on the Texas vs. New Mexico, over the waters of the Rio Grande. I represented the Department of Justice in Nebraska vs. Wyoming, over the waters of the North Platte. The United States interpleaded—intervened, I guess. [926]

(Testimony of Harold Conkling.)

And then several times in the state courts here. Not very many.

Q. Have your qualifications as an expert ever been questioned? A. No.

Mr. Dennis: Counsel, do you desire to ask any further questions?

Mr. Shryock: No questions.

Q. (By Mr. Dennis): Now, Mr. Conkling, at the request of the Santa Margarita Mutual Water Company, have you made any investigation of the Santa Margarita River and the problems that exist in that watershed? A. Yes, I have.

Q. What have you done?

A. Oh, I have taken the data which was available, as furnished by Camp Pendleton and by the Vail interests and by the U. S. Geological Survey, and analyzed them thoroughly. And what I have really done is to try to find out how much water would be available to Camp Pendleton if during the past period of record the Vail dam had been constructed and was being fully utilized, and if the proposed Fallbrook reservoir of 70,000 acre-feet capacity had been developed and was being fully utilized to its fullest possibilities. That is, I have done it that way, because I thought I could approach more readily the fundamental and important items which are in the [927] case rather than to spend my time on unimportant items.

Q. In connection with those studies have you prepared a brochure, which is composed of bar graphs, reports, and tables and maps?

(Testimony of Harold Conkling.)

A. Yes, I have.

Q. Do you have that with you?

A. Yes, I have.

Mr. Dennis: I have heretofore furnished counsel for the plaintiff and the Court with a copy of that brochure, and I would like to offer it in evidence as Defendants' Exhibit, I believe, Y.

The Court: Then we will number as a part of Y, as Y-1, and so forth, the various 14 exhibits which you have attached to this.

Mr. Dennis: Yes. Mr. Conkling has given each exhibit a number.

The Court: There are 15. We will mark them under that letter, 15 under that letter.

(The documents referred to, marked Defendants' Exhibits Y, Y-1 to Y-15, inclusive, were received in evidence.)

Q. (By Mr. Dennis): I believe, in addition to that, you have prepared another bar graph showing the discharge in acre-feet on the Santa Margarita River.

A. That is right. I have left a blank in this volume for that exhibit, which is No. 9, but it was a little large [928] to put in here.

The Court: All right. That will go in, then, as Y-9.

Q. (By Mr. Dennis): Do you have additional copies of that bar graph with you now?

A. I have one with me.

Q. You have just one?

A. Yes. That is the first thing (indicating).

(Testimony of Harold Conkling.)

The Court: I don't need any, gentlemen, because ultimately, when I work on the case, I will have the original exhibits. So those that you give me to use while the testimony is going on, I will return to you. Here, I will return to you my copies that were furnished this morning.

Mr. Dennis: We have plenty of those, your Honor.

The Court: I will return them. They just clutter up my desk.

Mr. Dennis: I think that Mr. Wright wanted a copy of these, so I will give them to Mr. Wright.

Mr. Shryock: I take it, if your Honor please, that as to any of these exhibits, at an appropriate time we would always be in a position to make a motion to strike?

The Court: Oh, yes. They are merely introduced because he is going to refer to them as he testifies.

Mr. Shryock: Yes, sir.

The Court: This is a manner of identifying them.

Mr. Shryock: Yes, sir. [929]

The Court: And then, as each of them comes up, if you have any objection, you may present it. I think they are merely to illustrate the testimony he is to give.

The Witness: That is correct, your Honor, yes.

The Court: They are diagrams and other things to illustrate your testimony?

The Witness: That is the case, yes.

The Court: All right. Let's go on.

Q. (By Mr. Dennis): Mr. Conkling, will you

(Testimony of Harold Conkling.)

explain to the Court what you did in connection with the preparation of these various exhibits, and where you obtained your information, and the conclusions which you draw from them, and the purpose for which they were constructed?

A. I have already stated where I got the information. I will repeat it again.

The Court: You don't have to repeat it.

Q. (By Mr. Dennis): I mean, as to each individual exhibit?

A. Oh, yes. All right.

The Court: Do you want to do as Mr. Caldwell did, take each exhibit and state what it purports to show?

The Witness: I would like to go right straight through, yes.

The Court: Yes. I think that is a very good system, and then you can amplify and fill in. [930]

The Witness: I will just go right straight through and fill in as I go along. I think that would be better.

The Court: Yes, fill in as you go along. That is right.

The Witness: All right. Exhibit 1, as I stated, on the reverse side of the first sheet is the subdivisions of the Santa Margarita watershed, and the isohyets of 67-year mean season, for the period 1883 to 1947.

It occurs to me—I copied this out of the U. S. Engineer Department's report, but it looks to me like it is about 64 years rather than 67. That is a

(Testimony of Harold Conkling.)

photostat of two plats, combined on one photostat, pages 1 and 3 from Appendix 2, Report of U. S. Engineer Department on the Survey Flood Control, Santa Margarita River and Tributaries, of March 15, 1949.

The reason I made this map was to get a general idea before myself and the Court of what the watershed looked like and where the rainfall occurred and where the runoff came from, and, also, to see if I could make an estimate of the amount of water that came off the watershed between the Fallbrook gauging station, which is the next to the lowest gauging station on the stream, or was, at least, during this period, and the Ysidora gauging station, which is the last gauging station on the stream. Water passing the Ysidora gauging station goes out into the ocean as wasted. [931]

So I did succeed in making an estimate of the amount of water that originated below the Fallbrook gauging station, and the total amount in an average period of runoff is 7,410 acre-feet coming from three subdivisions.

But before going into that, I think I should go back on this exhibit and tell more about it.

If you will look up at the top of the tabulation on the page facing the map, you will see that this shows the values for the period 1924-1947, that you regard as a period of average runoff.

I so took it from Bulletin 1 of the State Water Resources Bulletin which has been recently published, which gave estimated values for the runoff

(Testimony of Harold Conkling.)

at each one of the gauging stations on the Santa Margarita River for the period from the water year 1894-95 to the water year 1946-47. That period embraces two periods of drought and two periods of surplus runoff. [932]

The reason I say that is because I suppose everybody knows the precipitation in Southern California comes in a more or less cyclic character, the cycles averaging about 24 to 25 years long in which you will have one period of drought and one period of surplus. That, I say, is the average. And this particular period embraces two of each, drought and a period of surplus.

When that is plotted—when that period is plotted with the accumulated departure from the mean it is found that the period 1924 to 1947 is an average period, and so by taking that period eliminates all difficulties which come about by utilization of any other periods—that is the total period of record.

Going back to the graph now. The subdivision 1 over on the right, "head waters," is the total area above the Vail reservoir on the Temecula Creek.

Subdivision 2 is the total area above the Murrieta gauge, on the Temecula gauge on Murrieta Creek.

Subdivision 3 is the area between those two gauges and the Railroad Canyon gauge.

Subdivision 4 is the area draining to the river between the Railroad Canyon gauge, which is the upper end of the canyon, of the river. Railroad Canyon gauge is at the lower end of the interior valley. And the Fallbrook gauge, which is the third

(Testimony of Harold Conkling.)

gauge down on the river—I say item 4 is the area [933] there between the Railroad Canyon gauge and the Fallbrook gauge.

Item 5 is the area and run-off between the Fallbrook gauge and the proposed DeLuz dam site which is practically at the mouth of this canyon which runs through the mountains from the interior valley to the coastal plain.

Item No. 6 is the area between the DeLuz dam site and the upper end of the O'Neill basin in Camp Pendleton.

And Item 7 is the area between that point—the upper end of O'Neill Basin and Ysidora gauging station which is down at the lower end of the lower basin—that is the Ysidora Basin of Camp Pendleton.

Now, to make it as brief as possible, the area between Railroad Canyon and Fallbrook gauging stations has an approximate 19.8 average annual precipitation according to the U.S.E.D. Isohyete lines—these small lines on this graph. The fine lines are the Isohyets which means the lines of equal precipitation.

The Isohyets show that in the widest part of the watershed the average rainfall, annual precipitation, goes up to 24 inches over there on the north side of the river. But the maximum in the watershed itself on the average is 19.8 inches out between Railroad Canyon and Fallbrook and 19.9 inches between Fallbrook and DeLuz station.

One has an area of 50 square miles and the other

(Testimony of Harold Conkling.)

62 [934] square miles and this area, the run-off between—at Railroad Canyon and the run-off at Fallbrook has been measured for this entire period of 24 years and the average run-off during that period, from that area, was 92 acre-feet per square mile.

Now, the run-off from Temecula Creek above the Vail reservation was about 34 acre-feet per square mile with a precipitation of 16.4 inches, and the Murrieta Creek with a precipitation of 15 inches was 39 acre-feet per square mile.

Well, using those unit values and the precipitations as given by the isohyets in the lower basins, I estimated the acre-feet per square mile from the different basins and below Fallbrook and above Ysidora and got 7,410 acre-feet. That is to be used afterwards. You understand the material here is more like a report on a development of a river system than ordinarily given in testimony of this kind.

And so we build up the basic data first and draw some conclusions later on.

Exhibit 2 gives the sewage return from Camp Pendleton to Santa Margarita in terms of million gallons which was given by the—which is the term in which it was given by the Camp Pendleton testimony, by Plaintiff's testimony, and that is changed into acre-feet.

Down at the bottom of the page I have given the averages [935] for 1943 to 1947; 1943 to 1952 and 1951 to 1952. 1943 to 1947 has the most meaning for this report although and I shouldn't quite say that,

(Testimony of Harold Conkling.)

1951 and '52 also do. I had to estimate it for a couple of months in 1952—August and September because I didn't have the data.

Exhibit No. 3 gives the total pumpage by Camp Pendleton and by the Navy Department from the river beginning with 1942-43 and ending with 1951-52. That is a period of 10 years. It gives the average for '43-'47 and the average for '43-'47 is 5,490 acre-feet and the amount for 1951-52 is 5,970 feet.

Exhibit 4 gives the water used in millions of gallons per day per capita or in gallons per day per capita for three cities in Southern California. The cities are Santa Ana, Santa Monica and Los Angeles.

This was taken from the reports of the Metropolitan Water District and in many cases the reports they have in there are possibly not authentic but these three cities, I am sure, are quite authentic.

Now, this use of water per capita is as stated in the text or the table and involves the use in residences and residential lawns and gardens, fire fighting, street cleaning and washing, parks and cemeteries. In other words, it is the gross use of water.

It turned out to be 137 gallons per unit of population in Santa Ana; 133 in Santa Monica and 147 in Los Angeles, which [936] is probably affected somewhat by the fact that a considerable part of that is in the San Fernando Valley where it is quite hot and by the large suburban traffic which comes into the city every day to work. But I regard

(Testimony of Harold Conkling.)

the City of Santa Ana use as more nearly like, as far as climate is concerned, is more nearly like Camp Pendleton than either of the others.

I note in the application to appropriate which has been made by the Navy and in protest, that they use the value of 100 gallons per day per capita as what is needed for the camp, which is logical to assume that a smaller amount would be needed by the camp than for a city because of the larger area of lawns in a city compared to the population.

Exhibit 5. Now, I haven't stated as I went along what exhibits these came from but I will go back right now and do so.

Exhibit 1, that data came from United States Water Supply paper, Plaintiff's Exhibit No. 14, and Mr. Hall's testimony which amplified—gave some more recent data than was available in the other.

Exhibit 2 of Defendant's is from Plaintiff's Exhibit 22.

Exhibit 3 of the Defendant is from Plaintiff's Exhibits 26 and 27.

I already explained what Exhibit 4 is. That is from the Metropolitan Water District publication and annual report for 1951 or—it was published in 1952. I have forgotten what [937] year it was for, whether it was '50-'51 or for the calendar year '51.

Exhibit 5 is from Plaintiff's Exhibit 28 and is merely the use of water for irrigation on the Vail Ranch in acre-feet, plus the monthly distribution and per cents.

(Testimony of Harold Conkling.)

Exhibit 6 of the defendant is from pretrial Exhibit 1. Has that been changed? Has an exhibit number been given to that, Mr. Dennis?

Q. There has been an exhibit number given to that now.

Mr. Shryock: See if that wasn't your Exhibit I.

The Witness: Exhibit I?

Mr. Shryock: I am sure that is the one that you later got in as your exhibit.

Mr. Dennis: No, that is not it.

The Witness: I think it is Plaintiff's Exhibit 34.

Mr. Dennis: It is Defendant's Exhibit O.

Mr. Shryock: That is right.

The Witness: Defendants' Exhibit O?

Q. (By Mr. Dennis): Yes, Exhibit O.

A. Well, that is the pumpage of the Fallbrook Public Utility District which, by the way, as I believe was stated this morning, is above the Fallbrook gauging station, and it is in acre-feet and——

The Court: You were talking about 6?

The Witness: That is Exhibit 6. [938]

The Court: All right.

The Witness: And I had to estimate the last year because I didn't have the last two or possibly three months. It may be slightly out. And over on the side is the next average for 4-24-27, which was a normal amount, 74 acre-feet, and '51-'52, 1300 acre-feet.

In Defendants' Exhibit 7 there is a tabulation from the water supply papers of the run-off of Nigger Canyon, Railroad Canyon on Temecula

(Testimony of Harold Conkling.)

Creek and at Fallbrook on Ysidora on the Santa Margarita River in acre-feet.

Now, Exhibit 8 is that same information in graphical form. Had we better put this upon the board? Would you like to look at that, your Honor? I want to get over a certain idea about that.

The Court: All right.

The Witness: Give me one of those backs, will you, Bill?

The Court: All right.

The Witness: This is the graphical expression of Plaintiff's Exhibit 8. It shows by columns whose length is proportionate to the run-off.

The run-off for the Nigger Canyon station—the word “creek” after “Nigger Canyon” is a draftsman's idea. And for Railroad Canyon with also the word “creek” after it and Fallbrook with the word “river” after it and Ysidora with the word “river” after it. Also there are the averages for the [939] period with a 28 year period, 1924-25 to '51 and '52. What I want to point out there and which this shows instantly if you are trying to get very much yield out of the Santa Margarita River, you have to build a reservoir and a pretty large reservoir and that the capacity of the reservoir must be several times the safe yield you will get out of the reservoir. In other words, if you will take the period from 1927 to 1932 you will see that you would have to lop off and hold over quite a lot of that 91,200 acre-feet that is Ysidora station and carry it over there through 1936 and also if you were going

(Testimony of Harold Conkling.)

to supply the period from 1946 and '51 you would have to do—also take a lot of the storage from these periods—these rather heavy years in 1937 and 1941 and 1943.

The Court: The flood certainly shows up beautifully in 1938, doesn't it?

The Witness: Yes. That was a big one. Now, it doesn't show that you can't use averages in this investigation.

There has been 50,000—there has been proposed on this reservoir on this stream already by two agencies, just leaving out the situation for the moment—the Santa Margarita River—the Santa Margarita, the Fallbrook, proposed Fallbrook dam. It shows there has been proposed, and 50,000 acre-feet has been built, there has to be 238,000 acre-feet of capacity on this stream which means with, 240,000 acre-feet of capacity, you can pretty well control most of these high years. Some [940] of them will escape at that. Well, so much for that. You understand that is historical.

If those years were repeated exactly they wouldn't be the same because the Vail reservoir has been built and would take a substantial average amount away. Most of it would be taken away from these big years.

You understand any storage project depends upon the big years for a supply and the Vail project would take more of the big years and reduce those down to something else—a much smaller quantity.

Exhibit 8 at the time I made this, I had some-

(Testimony of Harold Conkling.)

thing else in mind but I couldn't show this graphically because it was just too big.

Exhibit 9 in the monthly and annual discharge at Nigger Canyon, Railroad Canyon and Fallbrook and Ysidora, but it shows the same considerable diversity and if you examine it closely you will be surprised how many years there was water, how many months was wasting water into the ocean past Ysidora and any water that wastes into the ocean past Ysidora was at that time subject to appropriation.

Now, Exhibit 10 shows what I was just telling about, graphically, and in average form.

It shows that—well, at the top of the page is a line which shows the number of months of record for each one month—that is the number of Januarys they had a record [941] and the number of Februarys that had a record at Ysidora gauging station.

Now, that shows in October, 8 out of 27 months there was flow past Ysidora into the ocean, waste water.

In November, 12 out of 27 months.

In December, 21 out of 27 months.

In January, 24 out of 27 months.

February, 24 out of 27 months.

March, 23 out of 28 months.

April, 22 out of 28 months.

May, 19 out of 28 months.

June, 12 out of 27 months.

July, 4 out of 26 months.

August, 3 out of 26 months.

(Testimony of Harold Conkling.)

September, 4 out of 26 months.

Now, that of course might give a false impression because actually the amount of water that flows into the ocean in some of those months is very small, so you will have to turn over to Exhibit 11. That shows how much in the 28 years of recorded discharge, how much water on the average went into the ocean in each month. As is apparent most of it went into the ocean in January, February, March and April.

Now, this shows again that for utilization of that water it must be conserved even if that was the flow for any one year. It must be conserved. It must be held in reservoirs [942] to the time it can be used and the peak use, of course, is in June, July, August and September.

So, you would have to have quite a lot of storage for very much use of water even if you had a year—every year alike.

Now with this background what I was trying to seek was how much water would go into the ocean with the Vail reservoir built and the Fallbrook reservoir built, so I operated roughly, of course, as to the Vail reservoir under certain assumptions which I have given in Exhibit 12.

If you will read through the first paragraph on that, under No. 1, you will see that the last sentence is not an assumption. That should have been a conclusion.

Well, I assumed that the demand on the reservoir was 7,000 acre-feet. I assumed that you could, if

(Testimony of Harold Conkling.)

you wanted to put it underground—a net demand of 7,000 acre-feet and that pretty well agrees with what the U.S.E.D. decided and with that demand during this period, 1923-24 there was certainly spills which are enumerated at the bottom of the page. Otherwise, except for return flow the water that goes past the Vail reservoir or got to the Vail reservoir was captured and held in the reservoir and then fed out. [943]

Now, the reason for making such a study is to find out how much the stream would be depleted if you had a full supply available to the reservoir, or more than a supply, during such a period. In other words, you make the study to find out if the reservoir can stand such a diversion, and you make a study to find out how much evaporation would occur on the average, to deplete the supply down below, and I found an average evaporation of 2400 acre-feet during the period—it says here 1942-52—it should be 1924-52, in the third paragraph.

I also did not decrease the content by siltation for the period.

Siltation is silt deposits, and estimated by the U.S.E.D. to be about eight-tenths of one per cent of the flow of the stream, which would mean that these reservoirs would be all silted out at the end of a 25-year period, and there would be a fairly large loss in capacity. I haven't tried to figure it out.

Have you any questions about that, your Honor?

The Court: No. Just go ahead.

The Witness: Now, the next step was to find out

(Testimony of Harold Conkling.)

how the operation of the Vail reservoir to the full extent would affect the discharge on the Santa Margarita at Fallbrook.

Now, the assumptions were made as follows: All of that 7,000 acre-feet of safe yield could be consumed by pumping [944] the deep percolation from the irrigation.

An additional 1,000 acre-feet can be developed by pumping the alluvium between the Vail reservoir and Temecula Gorge.

60 per cent of the historical pumpage is assumed to have been consumed by crops on the ranch. The remaining 40 per cent goes downriver past Railroad Canyon gauging station.

The 40 per cent of each year's flow lost downriver is subtracted from the amount of each year's flow caught in the reservoir plus 1,000 acre-feet from other sources to get the net change in stream flow at Fallbrook.

But I think it will be very difficult to operate so that they will ever get that amount. In other words, if you will look down here, in this tabulation, you will find that in the average period, 1924 to 1947, there would have been 8,420 acre-feet consumed over and above the amount historically consumed, and, as I say, I think the difficulty will be so great in ever reaching that figure that it may not, or probably will not, occur. Nevertheless, it is a conservative view.

Now, then, we come to the Fallbrook reservoir. We have a reservoir capacity of 70,000 acre-feet.

(Testimony of Harold Conkling.)

That is the combined figures named in the applications of the Fallbrook Public Utility District and of the Santa Margarita Mutual Water Company.

This reservoir, during the period in which it was operated, between 1924 and 1947, spilled six times, and with an evaporation average of about 2,800 feet a year.

That reservoir has about 1,000 acres of area when full, which is about the same as the Vail reservoir.

Now we come to the pay-off on all this investigation which has gone before. That is given in Exhibit 15. The question is: How much water would there be remaining at Ysidora if these two reservoirs were operating, as shown in the previous pages?

We have a discharge at Ysidora, an average annual discharge for the period 1924-1947, of 31,920 acre-feet, and then we will divert—it says 20,980 acre-feet. It should be 20,880 acre-feet. There is an error of 100 acre-feet there. That is immaterial in that figure.

So that you have left now, in round figures, 11,000 acre-feet average annual discharge past Ysidora, if these two reservoirs were put in and operating, as has been described heretofore. And from that must be subtracted the amount of increase in diversion between, oh, between DeLuz and Ysidora, which has taken place historically during the period, and you finally come up there with one assumption.

You assume that the net diversion for Pendleton prior to the time it was taken over by the Govern-

(Testimony of Harold Conkling.)

ment averaged 2,000 acre-feet per year, and we come up then with—to [946] bring it up to date, we come up with 1,320 acre-feet, which must be subtracted from the previous figure of approximately 11,000 acre-feet. So we have a figure of 10,000 acre-feet, which is the amount of water which would waste past Ysidora into the ocean if we went through a series of years such as we have had since 1924 and up to 1947, with Camp Pendleton developed up to its present demand on the river, that is, its demand on the river as of 1952.

Now, that is one answer. I don't know whether that is the right answer or not, because there is a question whether Fallbrook reservoir could divert all the water. I am not trying to solve or make an answer to that, but I am trying to present this.

Let us assume Camp Pendleton has a right to all the water it has heretofore diverted, and that this went back through the 24 years, and then the amount of water which would come down there and be available and pass Ysidora, if nothing else was done, would be 11,600 acre-feet average annual, instead of 9,600, or about 2,000 acre-feet more.

The Court: Is this a good stopping point?

The Witness: All right. I am tired, too.

The Court: We will take a short recess.

(Short recess.)

The Court: All right.

The Witness: When we recessed, I was talking about [947] Defendants' Exhibit 15, and I gave

(Testimony of Harold Conkling.)

the conclusions, and I might now explain some of those items.

In 1952 the net diversion from Camp Pendleton, that is, the total diversion minus the sewage which came back into the river, the river basins—this does not look right to me. Let me see what is the matter with it. Oh, yes. That is the 3,850 acre-feet, that is the total diversion, minus the sewage return, for 1952.

Now, lumping off the actual net diversion in 1943-47, of which we have records of diversions for the camp and the sewage return, we had 22,820 acre-feet. I have kept that together, because I want to divide it and get the average for the 24-year period.

Now, then, here is something: Assume during 1924-1942, 19 years, at a 2,000-acre-feet average—I assume that prior to purchase by the Government that about 2,000 acre-feet were consumed net in Camp Pendleton. I am not sure of that figure at all. I do know that in the '30s they developed, I believe, one of the orchards on the mesa, and I do know that they had some development over to the south. I have forgotten what you call the mesa, but it is toward Oceanside from the river. So I thought that was a fair figure, being approximately half of the net use as of the present time.

I think there is testimony and data to the effect that [948] the diversion was 8,000 acre-feet, which was given in the Santa Margarita—what is the

(Testimony of Harold Conkling.)

name of the case—Santa Margarita vs. the Vail Ranch?

The Court: Vail against Santa Margarita.

The Witness: Well, it was the lower people that brought the suit against the Santa Margarita. Anyway, there is some testimony in there, or some statement, that there was 8,000 acre-feet. I don't know how true that was, but I took, or I thought that was a reasonable figure here, and I can't find any data on it. I could have taken the 8,000 acre-feet, but didn't. For the 24 years it is 2,530 acre-feet per year, as what was historically the case. That is the case during the period of record. But we are going to have, with the present—if this present situation had existed during the period of record, there would have been a diversion of 1,320 acre-feet more, and that subtracted from what should be, instead of 10,940 acre-feet, subtracted from 11,040 acre-feet, would have left 9,720 acre-feet average annual waste into the ocean, with Camp Pendleton constructed and using the water for about 50,000-odd, possibly 57,000—55,000 people in the camp. That was the net use, and if that had existed during that whole time, you would have 1,320 more acre-feet, and you would have 9,720 acre-feet wasting into the ocean. Not every year. That is the average.

Now, of course, the question is: Does that come in [949] in a way that is usable and capturable? Of course, it would be in the large years, pretty largely, although not entirely.

(Testimony of Harold Conkling.)

You have between—according to Exhibit 1, which I believe is a little too small, the estimate there, but I believe the estimate of 7,410 acre-feet originating below the Fallbrook reservoir and above the Ysidora gauging station, that 7,410 acre-feet may be a little too small, but that comes in the same erratic way, presumably, that the recorded discharges of Fallbrook, say, come, and then on top of that you have the waste past the Fallbrook reservoir, which will pretty largely come in the periods of high runoff, that is, the years of high runoff and the months of high runoff.

Well, I made a study of what could be done with that water. Assuming that you had and that there was available 40,000 acre-feet of capacity unwatered in the alluvial basins, including the O'Neill basin and the Chappo basin, there has been testimony to the effect that there is that much capacity in those basins which could be used for storage, then, if during this average period, if a reservoir of 60,000 acre-feet had been constructed at De Luz and the water had been released from that reservoir into the ground water after the floods, put underground, the yield during that period would have been about 5,000 acre-feet over and above the present yield, which is sufficient to take care of the present personnel on Camp Pendleton. In other words, the [950] present yield is sufficient to take care of the camp, the personnel and the lawns, and the hospital, the golf links, and every use of water that is made there, and, in addition, there could be 5,000

(Testimony of Harold Conkling.)

acre-feet more, with a normal size reservoir. [951]

The Court: A reservoir which isn't there yet.

The Witness: Is not there yet.

The Court: Which is proposed to be built.

The Witness: Proposed to be built, yes. And that is more than sufficient to take care of the additional personnel.

I made some estimates of the amount of water that is being used. I believe I did recite those in my testimony. I believe there was—now, I don't know whether I said anything about it or not but I shall.

In connection with Exhibit No. 4 in use of water per capita, I made or tried to make some estimates of the amount of water which was being used now per capita and my difficulty was to find the per capita. I mean I don't know how many people are actually drawing on that water from Santa Margarita River.

If the whole personnel of the camp is drawing on it they are using about 85 gallons per day per capita. If 70 per cent of them are drawing on it, and I think the average would be more than that, they are using about 112 gallons per day per capita.

You understand in a city the use there—Santa Ana which I take as the more nearly comparable in terms of climate involves parks and very large areas of lawns as compared to this camp.

My belief is they don't need for the additional personnel [952] anything more than 100 gallons per capita per day.

(Testimony of Harold Conkling.)

The Court: All right.

The Witness: That is just about the end of my string.

The Court: All right. Let us have Mr. Dennis ask further questions from here on. I gather that what you are doing is this, you are postulating the existence of a reservoir over a period of years that would help refill the underground.

The Witness: Yes.

The Court: So as to give you a natural surplus. You are not stating that there is a surplus at the present time.

The Witness: Not with the natural flow, no.

The Court: All right.

The Witness: No, sir, I am stating this, however. Maybe we had better——

The Court: My questions have been simple questions. If they were involved Mr. Dennis would have been on his feet.

The Witness: No, no, I am trying to paint the picture rightly. If they would get the same amount of water and it would be held back at Fallbrook and only the water which passed Fallbrook and came down went into the ocean.

The Court: But that is not so clear as your last answer. I will take the direct answer he gave to my question.

Q. (By Mr. Dennis): Mr. Conkling, I think in your studies that you just recited, you were assuming that during this [953] period of time that the Vail reservoir had been built and in operation dur-

(Testimony of Harold Conkling.)

ing that entire period of time, and that the reservoir at the Fallbrook site had been built and in operation during that period of time.

A. That is right.

Q. And assuming that those two reservoirs had been built and in operation and had stored all of the water which passed the site of the two dams, respective dams, there would still be sufficient water that the Navy could utilize and collect by means of a small dam of around 50,000 acre-feet at the DeLuz site to use to recharge the basins.

A. I said 60,000 but that is because there is quite a big run-off at the Fallbrook reservoir and there would also be quite a spill out of the Fallbrook reservoir.

Q. Now, I believe that during your testimony you used the initials "U.S.E.D." and I thought sometimes you said U.S.G.D. Will you tell us what you meant by that?

A. Well, that is because I didn't talk plainly if it sounded like "U.S.G.D." I used U.S.E.D. and that is the United States Engineers Department.

Q. And I believe in calling your attention to Exhibit 8 attached to your report—

The Court: It is understood, so there will be no confusion in the record, that whenever we refer to Exhibit 10 or 5 it is one of the exhibits—it is a subdivision of [954] Exhibit Y, Y-8 and Y-9 and so forth. Otherwise there might be confusion between that number and the numbering of the plaintiff's exhibits.

(Testimony of Harold Conkling.)

Perhaps we should do the way they do in the State of Oregon, at least in the Federal Courts of Oregon. They number all their exhibits numerically and they run them right through so you never know when the plaintiff begins or the defendant begins, because they all have a number.

If you testified in Judge Fee's court in Washington in that water case he had there you would find out that is the way he does it. But our custom here conforms to the state practice, so we number the plaintiff's exhibits by number and the defendant's exhibits we number by letter. All right.

Q. (By Mr. Dennis): Calling your attention to Defendants' Exhibit Y-8. The figures which appear in the respective columns, the columns under Nigger Canyon, Fallbrook Canyon and Ysidora, represents the number of acre-feet in hundreds which pass that gauging station at that time. For instance in February of 1922 there would have been one 1—— A. 170 feet—no, 1,700 feet.

Q. 1,700 feet? A. Yes.

Q. So that the figure 1 then would express one thousand and the figure with a decimal point in front of it would mean 700? [955]

A. I believe I should have set up there at the head instead of 100 acre-feet it should have been a unit is 1,000 acre-feet.

These are the records from the U. S. Geological Water Supply papers and are to the nearest 100 acre-feet for simplicity. At the time I made this I thought we would have to refer to these figures

(Testimony of Harold Conkling.)

and it was much more convenient to have them shortened up like that than to have the longer figures as given in the United States Geological Survey papers.

Q. And the figures which are reflected in Defendants' Exhibit Y-7, Y-8, Y-9 and Y-10 were all obtained from the U.S.G.S. Survey papers?

A. Yes.

Q. And taken from Plaintiff's Exhibit 14, I believe?

A. Yes, sir.

Q. And they represent the actual amount of water which pass the gauging stations without any allowance for divergence?

A. Yes, the actual values.

Q. And I believe that the figures which are reflected in Defendants' Exhibit Y-5 are figures which were obtained from Plaintiff's Exhibit 28?

A. I so stated. I went back and stated where those were taken from. [956]

The Court: Yes. He gave that. When he first testified as to the first four exhibits he didn't mention the source and then he went back and took up each of them and stated the source.

Q. (By Mr. Dennis): Now, in your testimony where you mentioned the Fallbrook dam you were referring to a dam which would be located at the approximate site which is known as the Fallbrook dam site or the Lippincott dam site?

A. Yes.

The Court: And as I gather it that location is

(Testimony of Harold Conkling.)

so indicated on the application of Fallbrook, isn't that true?

The Witness: That is true, but I might point out——

The Court: Is it yours, too?

Mr. Dennis: Yes, we have approximately the same points of diversion.

The Witness: I might also point out, too—I might point to Exhibit 1 and the Fallbrook dam site is at the lower end of subdivision 4.

The Court: This composite map you referred to.

The Witness: Yes, sir. If you will look at the lower end of division 4 you will see a triangle there just below the red mark. It is on the wrong side of the river. I got it wrong but here it is. It should be over here.

The Court: Near No. 6?

The Witness: Here it is right here. You can see this [957] mark.

The Court: Will you mark it on my copy?

The Witness: That should be out. There is the river. Now, that is the gauging station. Here is the Ysidora gauging station. Here is the Railroad Canyon gauging station. Here is the Murrieta gauging station and here is the Temecula gauging station.

The Court: All right.

Q. (By Mr. Dennis): I wonder if we could have the witness mark that on Defendants' Exhibit Y-1 also?

The Court: All right.

(Testimony of Harold Conkling.)

Mr. Dennis: I believe, your Honor, the court reporter has the exhibit at the present time.

The Court: You can do that later.

Q. (By Mr. Dennis): Now, Mr. Conkling, calling your attention to Defendants' Exhibit Y-15, if you had assumed that for the period of time when you have no record for Camp Pendleton diversions, the diversions had been 8,000 feet instead of 2,000 acre-feet per year, the amount of water which would have run into the Pacific Ocean as shown by the last figure of 9,620 acre-feet, would of necessity have been larger, would it not?

A. That is right, it would have been.

Mr. Dennis: That is all.

The Court: All right, cross examine. [958]

Mr. Shryock: Does that conclude the direct examination of this witness?

Mr. Dennis: That concludes the direct examination.

Mr. Shryock: If your Honor please, there are a number of questions which, of course, I think we might well ask Mr. Conkling at this time, but I believe your Honor will recognize that a very considerable amount of material has now been submitted to us and it is now after 4:00 o'clock and while I realize your Honor's desire to continue as expeditiously as possible, we most certainly would appreciate an opportunity to examine this material.

Mr. Dennis: We have no objection, your Honor.

The Court: I think we are moving very fast. Will you have another witness?

Mr. Dennis: No, I don't think I will have additional testimony, your Honor.

The Court: Is that all?

Mr. Dennis: I think I will be in position to close.

The Court: Is the State going to present any testimony?

Mr. Grover: No. I might say at this time——

The Court: One of your men delivered a speech down in San Diego and had it all fixed up where they had a big dam built there and had water coming from the second barrel and I thought you would have him here.

Mr. Grover: No, your Honor. [959]

The Court: What is his name?

Mr. Grover: I wasn't present at the time.

The Court: Kendall, wasn't it? It is one of your engineers, one of your men in the water department. I am not teasing. He made a speech in San Diego.

Mr. Grover: I am sure he did.

The Court: I happened to be there on the day the speech was reported and he had it all fixed up. The water was actually flowing. Well, all right, I have no objection, gentlemen. I have worked very hard since I have gotten back. I am working on an opinion at the same time I am listening to this, so I have no objection to continuing the case until tomorrow morning so as not to break into the continuity.

Mr. Dennis: I might have one or two questions. I would want to ask Col. Robertson one or two questions after we are finished with this and I might have an exhibit or two.

The Court: That is all right. I am not binding you gentlemen. I just want to have an idea of the time is all.

Mr. Grover: Your Honor, there is one factual point I might bring up. The State is interested, as you will recall at the pretrial hearing, it was mentioned we would investigate our proprietary interest in the watershed and we find we do own some property up there. We are a teacup user it turns out. I have made arrangements with the representatives of the Government to settle that amicably by mutual investigation [960] and unless we are mistaken in what the results of that will be, there will be no reason to litigate that.

The Court: That is all right.

Mr. Shryock: We quite agree.

The Court: If you want to handle it by stipulation you may do so. I am not crowding you gentlemen. I will give you ample opportunity to conclude your case.

I think the Court of Appeals is going to be shocked when they hear that while they are still debating whether I have a right to move the case, we have tried one phase of it after all.

Mr. Shryock: Thank you, sir.

The Court: Tomorrow morning at 10:00 o'clock.

(Whereupon, at 4:15 o'clock p.m. a recess was had until 10:00 o'clock a.m. Thursday, November 20, 1952.) [961]

November 20, 1952; 10:00 o'clock a.m.

The Court: Cause on trial.

Mr. Shryock: Mr. Conkling.

HAROLD CONKLING

resumed the stand as a witness for the defendants and, having been previously duly sworn, testified further as follows:

Direct Examination—(Continued)

Mr. Dennis: If your Honor please, in going over the record last evening, I found there were a couple of obvious errors which I think should be corrected.

On page 933, at line 10, it reads, "the period 1924 to 1927." That should be "1924 to 1947."

The Court: All right.

Mr. Dennis: On page 936, at line 24, the witness stated, "It turned out to be 137 gallons per unit of population." The transcript reads "137,000 gallons per unit of population."

I believe that we can agree that those corrections should be made, Commander?

Mr. Shryock: We can.

Mr. Dennis: And, if your Honor please, there are also two answers by the witness that I think should be explained, and I would like the opportunity of asking him to explain one or two of the answers which were previously made, prior [964] to his cross examination.

The Court: All right.

Mr. Dennis: Is there any objection, Commander?

Mr. Shryock: No.

Q. (By Mr. Dennis): On page 939, you say, "This is the graphical expression of Plaintiff's Exhibit 8."

I believe at that time you were holding the bar graph which is Defendants' Y-9; is that correct?

(Testimony of Harold Conkling.)

A. Exhibit Y-9 is the graphic presentation of the figures on Exhibit 8, Exhibit Y-8.

Q. And that was your Exhibit Y-8?

A. Yes.

Q. I believe yesterday, Mr. Conkling, in response to the Court's question:

"The Court: So as to give you a natural surplus. You are not stating that there is a surplus at the present time.

"The Witness: Not with the natural flow, no.

"The Court: All right.

"The Witness: No, sir, I am stating this, however. Maybe we had better——

"The Court: My questions have been simple questions. If they were involved Mr. Dennis would have been on his feet. [965]

"The Witness: No, no, I am trying to paint the picture rightly. If they would get the same amount of water and it would be held back at Fallbrook and only the water which passed Fallbrook and came down went into the ocean."

Do you desire to make any explanation or clarify the answer which you made to the Court's question?

A. Well, I guess I had better start back of that, in order to make it plain what I meant.

There is a large surplus of water in the Santa Margarita available for appropriation, and it has been filed on.

Let me go back a little further. The historical record shows a discharge at Ysidora, which is water wasted in the ocean, and which was available for

(Testimony of Harold Conkling.)

appropriation during those years of the records. That discharge will be decreased somewhat by the agreement between the Vail interests and the Santa Margarita interests, which is in effect now.

After that the Vail reservoir was in operation, and there will still be a large surplus of water wasted at Ysidora, which would not sink into the underground reservoir but which would just waste, regardless of some other items. And I did not mean to say in my answer that that water was not available now. It is available now. A large surplus is available for appropriation by the first comer, and I think I meant, by what you read to me there, that if the Fallbrook [966] reservoir were built and were available, and if the Vail reservoir were built and in operation, there still would be enough water coming by the—available to Camp Pendleton, to take care of its present requirements, which consists of the irrigated area, and to take care of the camp as it was in 1951-1952, when there was a population of 55,000, approximately, in the camp, and to take care of another 50,000 population, if reservoirs were built by the camp, as they will have to be, anyway.

Does that clear it up for you, Mr. Dennis? [967]

Q. I think so. Now, what is your—you have used the term “cyclic storage” and “seasonal storage” and I wonder if you would tell us what you mean by those terms?

A. Well, cyclic storage means storing water in

(Testimony of Harold Conkling.)

one year of surplus and carrying it through for the succeeding years of drought.

Seasonal storage means not exactly what it says. It means if you take—you think that means that it would be stored in the winter and released in the summer. It does that but it means more than that. It means that you would store water from a flood at the first of the month which went into the ocean and you used it the last of that same month or some short period like that, it would still be out of season—out of time. In other words—and that is the seasonal storage.

Any storage—any storage of water which goes into the ocean to be used later, even a very short time later, is seasonal storage.

Q. Could you tell us what is meant by the phrase “temporary storage?”

A. Temporary storage relates only to water which could be used directly, but which for the convenience of the individual concerned may be stored overnight, over the week or some short time so there will be a larger head of water to be used on what properties the individual or entity desires [968] to use it.

In other words, it has to be water which could be used but which was stored instead of being used. It does not relate to waters which wasted into the ocean if not used.

Mr. Dennis: That is all.

A. Just one additional thought. The main differentiation between “temporary storage” and

(Testimony of Harold Conkling.)

“seasonal storage” is whether the water which was stored could have been used or could not have been used at the time it flowed.

Mr. Dennis: That is all.

Cross Examination

Q. (By Mr. Shryock): Now, Mr. Conkling, after you had made that somewhat elaborate explanation of what you meant in response to the inquiry about the question which seemed to puzzle Mr. Dennis, you said, “I think that what I meant is——.” Now, that was a most cautious statement.

A. I didn’t have the transcript before me.

Q. I see. You are prepared to say that is what you meant then, is it?

A. Well, we will call it that, yes.

Q. Now, Mr. Conkling, I believe that I understand in my limited way what Exhibit Y and its 15 sub-exhibits proposes to demonstrate, although I do have a few questions as to some of the sub-exhibits. But first may I ask, does Exhibit Y, [969] if we look at it as a whole, in a sense propose the physical solution to which Mr. Dennis has referred? Is that your concept of it?

A. I don’t know—I don’t know what your water rights are. I have made it on two bases. If you will look at Exhibit Y-15, the one which in effect says “You have no water rights at all,” and so the upper entities—“You have no water rights at all for the water the way you are using it.” You do have riparian rights. And the upper entities can do

(Testimony of Harold Conkling.)

what they want to with the water and then even if all of the water was taken, as I said in my statement, by the two upper entities there would still be enough water coming down to Camp Pendleton to take care of the situation which I outlined in my previous answer.

Now, just to be clear and try to find out what would be the situation if you had the water rights—I mean the water which historically may have flowed into the ocean, but which appeared would sink underground now and be available to your purposes, I came up with the note on the bottom of Exhibit Y-15 which states what would happen under those cases.

Now, there is—between those two there is the physical solution.

I might say now while we are on the subject that I went, as you notice I stated in Exhibit 15—by the way, is there any question as to how Exhibit Y-15 was made up and the bookkeeping [970] attached to it? I would like to clear that up right now if there is.

Q. Well, suppose we come to that, Mr. Conkling, because I must confess I have a great deal of difficulty with Exhibit 15.

A. Let me go ahead with it then. The actual recorded discharge at Ysidora during the average period 1924-1947, the average annual flow there was 31,920 acre-feet. Now, what would it have been if there had not been water used in what is now Camp Pendleton or the ranch prior to the ownership by

(Testimony of Harold Conkling.)

the Government during that period of 24 years? Coming down to the fourth item and the sub-items under that it would have been increased if there had been no diversion by the amount of the diversion and we do know the diversion between 1943 and 1947 because we have a record of it.

I am speaking about the net diversion which was 22,820 acre-feet for those five years, but we do not know what the diversion was between 1924 and 1942 and I put that down at 2,000 acre-feet, but I would like to say—maybe I had better change it had I known this before. I will look into what bulletin No. 1 of the State says about the flows, the natural flows of the stream and I find out that at Ysidora during this period, 1924 to 1947, they say that the natural flow during that period at Ysidora was—would have been had there been no diversion at all, would have been 36,450 acre-feet [971] on the average, and of that increase over and above, or that difference that means a depletion, an average depletion of 9,160 acre-feet of which 1,786 acre-feet occurred from Fallbrook and above which left 7,400 acre-feet as the average depletion in the area below Fallbrook in that 24 year period. In other words, there were 7,400 acre-feet net according to the State being diverted during 1924-1947 period.

I did not use that figure but had I used that figure I would have substituted—I will come to that in just a moment, would have substituted another figure for the one we have in here, but going back now to the figures as I have them in this Exhibit

(Testimony of Harold Conkling.)

Y-15, I found that the average depletion with that assumption of 2,000 acre-feet, the average depletion, average net diversion from the basins was 2,530 acre-feet. If that had not been present we should have added that to 31,920 acre-feet and we would have had 34,450 acre-feet as the figure up there.

Now, subtract the amount of water diverted by the Vail reservoir and the amount diverted by the Fallbrook reservoir from that and we have a figure of——

Q. You simply carry it down?

A. Yes, just the bookkeeping arrangement. Is that clear all the way through now?

Q. I am afraid I cannot say that it is. In fact I think I am now a little more confused than I was when we [972] started. First of all, where did you get this 36,000 average figure that you speak of?

A. That is the state's estimate of what the flow would have been had there been no diversion in there.

Q. That is not the U.S.G.S. record?

A. That is not the G.S. record. This is the G.S. record that I spoke about.

Q. Well, do you feel now then that the figure 31,920 as an average for that period is not an accurate one?

A. Oh, no, that is right. That is right. It wouldn't have changed that figure—well, it seems to me it is just like—just like any bookkeeping proposition. We had 31,920 acre-feet out there which was measured. Now the State says if there had not been any

(Testimony of Harold Conkling.)

diversions from that, why, about 7,400 acre-feet per year more would have gone out there.

Q. If there had been no diversion?

A. If there had been no diversion. Now, the reason I brought that up at this particular time was that if I had used the State's figure here we would have come out with about an average of 13,000 acre-feet as available to the camp in addition to what they have been taking—to what they were taking in 1952. In other words, we would have had about 20,000 acre-feet available to the camp.

I did not use that figure but I have used a much more conservative figure, but this is presumably—presumably [973] the State has put more time on it than I have and maybe they are right. I am not saying they are wrong. I am just saying I didn't use it.

Q. So that the picture this morning looks more optimistic for us than it did yesterday?

A. If you use the State's figures, yes, but if you don't use the State's figures you are—we will stick to the figure that I have in here because that is enough.

Q. Well, then, again I say, Mr. Conkling, do you not concede that the general effect of Exhibit Y and its 15 sub-exhibits is to present what we might call a physical solution of the water problem existing on this stream?

A. That is right.

Q. And yesterday at page 940 when you were referring to this very splendid graph, which is Exhibit Y-9, and I mean that with the utmost sincerity.

(Testimony of Harold Conkling.)

I think it is simply a splendid representation of the facts applicable to this particular valley. You stated: "What I want to point out there," referring to this graph, "and which this shows instantly if you are trying to get very much yield out of the Santa Margarita River, you have to build a reservoir and a pretty large reservoir and that the capacity of the reservoir must be several times the safe yield you will get out [974] of the reservoir. In other words, if you will take the period 1927 to 1932 you will see that you would have to lop off and hold over quite a lot of that 91,200 acre-feet."

Now, doesn't that rather fairly represent your general approach to your study of this stream, Mr. Conkling? A. That is true.

Q. Namely, that you cannot make a rational solution of whatever problem that may exist without taking into consideration control structures?

A. That is right.

Q. Adverting to Exhibit Y-2, and this I might say is a relatively minor point, you have explained that as sewage of Camp Pendleton which returns to Santa Margarita River underground basins, direct or via Lake O'Neill, and as you explained, you obtained that information from Plaintiff's Exhibit 22? A. That is correct.

Q. And I don't dispute for one moment that you did and very accurately reproduced it.

A. Except for the estimated amount.

Q. Yes, I understand that. Therefore, as I understand it, you propose to help in the general over-

(Testimony of Harold Conkling.)

all picture by showing the water returned into the basin from the sewage disposal plant? [975]

A. That is correct.

Q. Would it surprise you to know that only one of those plants has been returning the volume of effluent ascribed to it since the camp was placed in operation by the Government; that plant No. 2—perhaps my numbers of plants may be wrong, has been returning it to the basin only since two or three years ago and that the third plant has been returning it only for the past few months?

A. Well, then, we would have to correct the average figure. [976]

Q. I simply call it to your attention——

A. Yes, thank you very much.

Q. ——so that we may not be misled by having Exhibit 2 represent to us that all of these figures show water which has historically here been returned into the basin by the sewage effluent.

A. That would be a final correction on Y-15.

Mr. Shryock: Yes, sir.

Mr. Dennis: Am I mistaken in this, that Mr. McNearny I think testified that all of the lines for sewage effluent and water distribution lines have been the same ever since they first took charge of the camp?

Mr. Shryock: I think you are mistaken by using the term "sewage effluent system." He said the water-distribution systems have been the same since the camp was established in 1942-43.

Mr. Dennis: I asked as to the sewage effluent

(Testimony of Harold Conkling.)

discharges, and nobody volunteered the information that it was different now than in the past.

Mr. Shryock: May I make it plain that I am not criticizing Mr. Conkling, because he took the figures from our Exhibit 22, and they did not indicate when the return began.

Mr. Dennis: I think this is the first time that there has been information given that these plants 2 and 3 have not discharged into the Santa Margarita basin. [977]

Mr. Shryock: That may be.

Q. (By Mr. Shryock): Now, Mr. Conkling, I now place before you your graph Y-9, and I believe that that is a graphic explanation of your Exhibit Y-8, is it not? A. That is correct.

Q. And that, in turn, with the exception of the fact that there was a mistake in the statement that the unit is 100 acre-feet, and I believe you corrected that to mean 1,000 acre-feet—— A. Yes.

Q. ——that purports to show the monthly and annual discharges at four of the stream-gauging stations? A. That is Exhibit——

Q. That is Exhibit 8 in the copy furnished to us.

A. No, no, I don't believe so. Exhibit 8—Exhibit 9—oh, yes, Exhibit 8, that is right. You are correct. I am sorry.

Mr. Dennis: I wonder if you would read that question back to the witness.

(The record was read.)

Mr. Dennis: You are referring to Exhibit Y-8, and not Y-9?

(Testimony of Harold Conkling.)

Mr. Shryock: No, I am referring exactly to Y-9, that Y-9 explains Y-8.

Mr. Dennis: Do you mean to say that shows a monthly [978] average, that Y-9 shows a monthly or an annual average?

Mr. Shryock: I don't mean to say that it shows anything but what it purports to show, but I simply say that I believe Mr. Conkling stated it was a graphic representation of Y-8.

Mr. Dennis: All right. Fine.

The Witness: Did I say it was a—it was a graphic representation of Y-7. Let's put it back there, which is the annuals, and that should be corrected in my statement of this morning, too.

Q. (By Mr. Shryock): Well, Y-8, then, is a breakdown of Y-7, is it?

A. Yes, it is a monthly itemization of the quantities that went into Y-7.

Q. Now, on Y-9, there you have computed what you call an average line, have you not?

A. Yes.

Q. And that appears on the graph alongside of your representation of the Ysidora gauging station, does it not? A. Yes.

Q. Now, what is the figure of that average?

A. 28,900.

Q. And that is for the period 1923-24 to 1952, through the water year 1952?

A. No, sir. 1924-25 through the water year 1951-52.

Q. And, therefore, that represents, for the great

(Testimony of Harold Conkling.)

bulk [979] of the period, a time when there was no control structure at all on the stream, does it not?

A. Yes, it does.

Q. Mr. Conkling, in your profession is what is called an average of an uncontrolled stream in what might be called a flash-flood area considered a reliable figure in estimating the stream's yield?

A. Well, you use an average to get a picture, and a comparative picture. Now, you can build enough capacity, storage capacity, to make the average.

Q. You are coming back to a reservoir, and I am asking the question——

A. Oh, yes, if you are making a survey of a stream system, such as we are doing here, to try to get a picture of the relation between runoffs by taking an average period as the best period to work with.

Q. Well, are you now telling me you water engineers consider that an average is one of the most desirable criteria to determine what a stream yields?

A. It is the first one I use. I am not sure about other water engineers. I use it as the best criterion to use.

Q. Well, you are——

A. I am a water engineer.

Q. Yes, sir. How many times does your graph there show the runoff at Ysidora in that period of some 27 years—show [980] that it rises above the average line? A. Seven times.

Q. Now, do you have your Exhibit Y before you?

(Testimony of Harold Conkling.)

A. Yes, I have.

Q. Now, turning to your Exhibit Y-10, there you purport to show the number of months in which, out of a period of 26, 27, or 28 years, there was a runoff at Ysidora; is that not correct?

A. Yes, sir.

Q. And that is merely what you might call a frequency chart, isn't it?

A. That is right. It is a condensation of all the data in Exhibit Y-8. It is intended to convey some picture of what Y-8 showed.

Q. And as to that exhibit, I believe that you yourself said, at page 942, "Now, that of course might give a false impression because actually the amount of water that flows into the ocean in some of those months is very small, so you will have to turn over to Exhibit 11."

A. That is correct.

Q. And I am quoting that merely to emphasize the fact that you yourself explained that it might be deceptive, and that we would have to look at Exhibit 11.

A. Yes.

Q. Now, Exhibit 11 purports to show the discharge in [981] acre-feet at the Ysidora gauging station based on peak months, does it not?

A. No, it is the average for each one of the months.

Q. Well, over what period?

A. Over the—well, over the same period. It doesn't say here, does it? Oh, yes, it does. It says "Average of Recorded Discharges by Months."

(Testimony of Harold Conkling.)

That means for the period covered by Exhibit 10.

Q. Which would, therefore, be for this 27-year period that we are speaking of?

A. That is right.

Q. And there we see that the peak month is March, of some 10,000 acre-feet, and almost as high is February, and then the other two months are January and April——

A. That is correct.

Q. ——for rather a substantial runoff?

A. Yes.

Q. Even in those cases, Mr. Conkling, isn't it true that there might be a runoff of only 500 acre-feet in one March—in a month of March—and perhaps 50,000 in another month of March?

A. There might be. I don't know. Yes, I think that is true.

Q. To that extent, it might be deceptive, in the sense that we cannot say that March is always going to give us [982] 10,000 acre-feet?

A. Oh, I don't think it was ever my intention of saying that. We all know that all of the streams in San Diego County and all of the streams in California and all of the streams in the West, and all the streams in Southern California particularly, have very erratic flows, that you have to hold water over from the surplus years to the other years.

I don't know why you bear down on this. It is known. It is a fact. All San Diego streams are developed many, many times by reservoirs much greater than the average flow. The Vail reservoir

(Testimony of Harold Conkling.)

has a capacity of seven times the yield, and five times the average flow.

Q. Which is the point, when you said——

A. That is a point we have to make. The point is this about this whole situation here, that you have to have reservoirs, and you don't have a right to the water—you don't have the right to water, under riparian rights, that just merely goes by there. You have to get it under an appropriative right. That is the point to the whole exhibit.

Q. Now, without reservoirs——

A. Without reservoirs you can't do anything, and you have to build reservoirs under an appropriative right, and perhaps you have to get the capacity which you create underground under an appropriative right to store water underground. Probably, you do have. In fact, the State insists [983] that if you are going to store water underground, you do it by appropriation, and you name the capacity of your reservoir underground. In other words, to store that water underground, which you are now doing, you may have to have an appropriation for it. At least, that is the rule that the States makes in the administration of the water law, which I did for 24 years.

Q. Then, again, I say that you have about concluded that there is no solution for whatever water problems exist on this stream, except by reservoirs?

A. Of course not. There is no solution for the development of any stream in California except by reservoirs, for full development.

(Testimony of Harold Conkling.)

The Court: The answer to the question, then, is "Yes."

The Witness: Yes.

The Court: All right.

The Witness: Well, didn't I say, "Of course not"?

Q. (By Mr. Shryock): Mr. Conkling, when did you——

The Court: You know, in French—and Commander Shryock knows French—they have an expression which does away with the possibility of an answer being misunderstood. They say, "Mais oui." It means, "But on the contrary," and there is no equivalent in English for it. Is there?

Mr. Shryock: Not that I know of.

The Court: That is "mais oui," "but yes." And it prevents an answer which sounds evasive, you see. [984]

The Witness: I didn't intend my answer to sound evasive because I didn't answer "Yes."

The Court: No, no. I am just pointing this out.

The Witness: Yes.

Q. (By Mr. Shryock): By way of illustration of what I was asking you about Exhibit Y-11, Mr. Conkling, will your figures show, for example, that in the year 1940-41, which was one of those 117,000-acre-feet runoff years—— A. Yes.

Q. ——how much ran off in the month of March, for example? A. '40-41? 53,600.

Q. That is a very substantial part of the 117,000? A. Oh, yes, yes.

(Testimony of Harold Conkling.)

Q. Now, Mr. Conkling, have you visited the Santa Margarita Valley above Nigger Canyon?

A. Yes. Oh, above? No, I haven't. Not recently, at least.

Q. Did you take into account any use of water in the lands above the Vails in making your general over-all approach to this study?

A. This is a record which I have used. I have used the recorded discharges which give effect to all depletions above Ysidora.

Q. Above Ysidora? [985]

A. Above Ysidora.

Q. Then you mean to say that you feel that you have taken into account riparian usage above the Vail lands?

A. Yes, substantially. There may have been some increase in the use since 1947, which is not taken into account. However, the nearest information—the best information I can get as to that is that any such increase is very small, and it wouldn't affect the general conclusion.

Q. Are you aware of the fact that the Vails have taken as high as 7,000 acre-feet of riparian water, historically?

A. I have their record in there some place.

Q. If they have a riparian right to that water, they still would be entitled to use that water, even though recent usage might be way below that figure, would they not?

A. Well, they have so much water there, and they are practically going to control the flow at

(Testimony of Harold Conkling.)

Nigger Canyon with the reservoir they have built, and whether it is used under riparian rights or whether it is used under appropriative right, it makes very little difference—no difference, so far as I can see. They are using it. They are using the water. What we are after is the depletion of the stream, as of the way they propose to manipulate the reservoir, plus 1,000 acre-feet bonus, which I threw in below the reservoir. And I said—I stated that I didn't think they could use that water, because it is just too much trouble to do it, and [986] because they didn't build an underground reservoir, which is not under control, and several other things.

So I think that the difficulty of using that water will be so much that they will not use it all.

Q. Mr. Conkling, you visited Camp Pendleton yourself, did you not? A. Yes, I did.

Q. That was on the 24th of October, do you recall?

A. I don't remember the date, but I did, recently.

Q. That was your only visit to the camp, was it not? A. That is correct.

Q. Incidentally, was the degree of access given to you satisfactory?

A. Oh, very pleasant. I had a very nice day. I enjoyed it very much, and I got around and saw everything but the golf course, I believe.

Q. And you weren't blindfolded?

A. No, I wasn't blindfolded when I went in.

(Testimony of Harold Conkling.)

Q. Now, Mr. Conkling, in working out this so-called physical solution, this matter that involves reservoirs, and you referred quite frequently in your testimony, I believe, to the Fallbrook reservoir and on occasion to the Santa Margarita Mutual reservoir and to the DeLuz reservoir but generally speaking you seemed to contemplate a 50,000, 60,000 or 70,000 acre-foot reservoir or reservoirs in addition to the Vail and those two generally were what you had in mind?

A. That is correct.

Q. As controlling the stream, isn't that correct?

A. The 70,000—I was talking about a 70,000 acre-foot reservoir at Fallbrook because the Santa Margarita Mutual Water Company has filed a 60,000 acre-foot storage capacity there and the Fallbrook Utility District has filed a 10,000 acre-feet.

Q. Yes, so you combined the two.

A. I combined the two and made it 70,000. Whether that is the best site for a reservoir I don't know. The canyon would have to be examined as to whether a better site could be found.

Q. Yes. Now, when you were describing your work with the state and describing your approach to the various water problems which came before you, you stated at page 981:

“But after I got into the investigational work it was found necessary to take entire stream [988] systems before you could conveniently and economically lay out a project.”

A. That was said with reference to my work

(Testimony of Harold Conkling.)

with the U. S. Reclamation Bureau and not with the State.

Q. I see. Has that in general been your approach to problems of this kind, that you have considered whether or not the solution would be an economical one? A. Oh, yes.

Q. Did you take into consideration the height of a dam that would be required to impound 70,000 acre-feet, Mr. Conkling?

A. I made the filings for the Santa Margarita Mutual Water Company and we filed on a reservoir which showed the height of the dam. I believe you have to show a cross section, a profile of the dam site, so we had a knowledge of the height of the dam, yes.

Q. Is there a State limit on height for dams of that character? A. No, none that I know of.

Q. Mr. Conkling, did you prepare the application to the State of California on behalf of the Santa Margarita Mutual Water Company?

A. It was done in my office. I didn't do it personally. I was not in and around when it was done.

Q. Excuse me. I hadn't quite finished. Not for the [989] dam but for the 60 cubic feet per second of diversion?

A. No. That was done from my office. As I say, I was not there at that time.

Q. Was it your recommendation as to the amount of the diversion?

A. No, but I will tell you how you do make such a diversion or how you would make such a

(Testimony of Harold Conkling.)

request. To get the water from the river up to the place of use required a pipeline of about 60 second-foot capacity. Now it might be that there would be 60 second-feet of water come down the river which could be diverted during the irrigation season and if so you would want to divert it into that pipeline of your 60 second-foot capacity. Therefore in justice to your clients you should put in a 60-second-foot direct diversion. It may be entirely meaningless but you do not want to foreclose them from diverting 60 second-feet when it was there to divert during the irrigation season if they had an opportunity to do so without drawing on storage.

Q. Meaningless except that if it were translated into acre-feet per year and were in fact taken it would be some 43,000 odd acre-feet, would it not?

A. Oh, yes, but that is utterly meaningless. It probably would be more than that but that is utterly meaningless because we know it isn't there and may never be there and probably—I think very probably will never be there [990] except in very small quantity and maybe they never could divert that because they didn't have a right to it. So, that is just an upper figure that you put on. You don't want to foreclose your clients just because of ignorance on your part.

Q. You say it may never be there?

A. Not as a direct flow when they want it. I don't know whether it will or not. If it is there, they are just lucky that they had somebody who knew how to file.

(Testimony of Harold Conkling.)

Q. I am sure they had a very able adviser.

Mr. Shryock: No further questions.

Mr. Dennis: No questions.

Mr. Shryock: Thank you very much, Mr. Conkling.

The Court: All right, Mr. Conkling.

The Witness: All done?

The Court: Yes, surprise. This is off the record.

(Discussion off the record.)

The Court: All right, Mr. Dennis.

Mr. Dennis: If your Honor please, at this time I want to put in evidence as Defendants' next in order table No. 16 which was filed in answer to the Santa Margarita Mutual Water Company demand for written interrogatories, which is the table showing the safe yield of the basins in the Pendleton area.

Mr. Shryock: No objection.

The Court: It will be received. [991]

The Clerk: Defendants' Exhibit Z in evidence.

(The document referred to was marked Defendants' Exhibit Z and received in evidence.)

Mr. Dennis: Now at this time I would like to offer in evidence Plaintiff's pretrial Exhibits 32, 23, 24 and 25.

Mr. Shryock: You would like to offer them in evidence?

Mr. Dennis: Yes. I believe that the exhibits which were actually offered in evidence do not agree with the pretrial exhibits in some particulars,

mainly—particularly in the reduction of size, reduction of markings which were on them, coloration—various areas which were colored and I would like to have the pretrial exhibits which were actually served on the defendants and filed with the court introduced in evidence at this time.

Mr. Shryock: Well, just so that we understand. Are you referring to the pretrial exhibits as to which we requested permission to withdraw them from the clerk and submit the ones that were actually handed out at the time they were offered?

Mr. Dennis: That is right.

Mr. Shryock: At which time, of course, we represented as to what we were handing up was exactly the same as what was being withdrawn.

Are you now saying that what you are offering is different from what was handed in?

Mr. Dennis: They are different from the ones which were [992] handed to me.

Mr. Shryock: Why not let us compare what you now propose to offer with what is in evidence and let us see if they are different.

Mr. Dennis: Well, for instance, let us take Plaintiff's Exhibit 8 which looks slightly different from the one which was handed to me in that many of the areas are colored, the size of the exhibit is different.

Mr. Shryock: Well now, may I say this, that in many cases we prepared these large exhibits and with the full knowledge and consent of the defendants submitted them smaller and more easily handled copies ahead of the trial.

Obviously when the time came to the trial of the case itself we handed up the originals as the best evidence that could be handed to the court.

The Court: I cannot see that the matter is worth arguing. If counsel feels that there is a variation he can offer them as his own exhibit and then at the argument he may point out or you may point out, that there is no difference, that it is merely because the size is different.

Mr. Dennis: My reason for that, your Honor——

The Court: I always take the view that we are dealing with physical exhibits and a question of reducing the size through photography may result in a variance and then there is no harm in having both in. [993]

Mr. Dennis: My only position is this, your Honor, that some of these exhibits have been reduced in size to such a degree it was an impossibility to determine what was depicted upon the exhibit.

Now it is my understanding also that only those features on the various exhibits which have been called to the attention of the court by plaintiff are to be considered in evidence. I just don't want to be in this position, that I am bound by certain facts depicted on the exhibits, full-size exhibits which went into evidence and which we with due diligence could not discover on the copies handed to us. I don't want to make an issue of it.

The Court: So far as the exhibits are concerned, gentlemen, all the exhibits are in the record. Those that are in the form of maps, of course, cannot be

translated into words. Therefore, the entire exhibit is before the court for such emphasis as counsel desires to make.

As to exhibits which consist of writing, they are transcribed into the record that is prepared and in the interest of economy of time we do not stop to read them because I read them myself before I decide the case.

I have read a lot of them as we go along and will probably read more before the case is submitted. So in the last analysis if there is a variance between two exhibits due to size the best way is to introduce both of them. [994]

Mr. Shryock: And may I say, your Honor, that I have no objection whatever to Mr. Dennis introducing as his exhibits certain documents regarding which he will say:

“This is what I received as Plaintiff’s Exhibit so and so” and “This is what I did my work from.”

The Court: Here is one other thought so far as the question of proof is concerned.

The exchange of exhibits is a very salutary method in trials of this character. All students of procedure have recommended it.

The committee which is known as the Prettyman Committee, of which I was a member, dealt with proof in protracted cases—chiefly antitrust cases and emphasized that fact and in the lecture I gave at the request of Judge Prettyman and Murray before the American Bar Association committee on judicial administration, and which you will find in the next issue of Federal Rules Decisions, I

emphasized that fact. But the exchange of exhibits does not bind the person who offers an exhibit or preclude him at the time of trial from offering a modification of an exhibit or exhibits. And unless the other party has been misled he is entitled to the version that he introduces at the trial at the same time for whatever argument it may be worth.

The other one may be put in to see if there is any variation. [995]

I don't want to close the testimony in this case and then have an argument made that would prevent one side or the other from giving full scope to what is in the record regardless of the form in which a particular exhibit may have been presented for convenience sake before trial.

Mr. Shryock: As I say, I have no objection to his offering them, sir, but I do resent the implication that we have attempted to mislead the defendant.

The Court: No, no, no.

Mr. Shryock: By submitting something less than the original.

The Court: He did not use the word mislead. I used that word.

Mr. Dennis: Commander, I haven't implied that.

The Court: Unless there is a prejudice which results to the other side they have a right to introduce the form which is more desirable in the trial of the cause.

Mr. Shryock: And I might say, your Honor, that Mr. Dennis has been in the office of Ground Water Resources 20 times. Furthermore we took

everyone of these original exhibits which we have offered as this case has progressed and have had them in our office in San Diego and sent formal notices to counsel saying: "You may come over and examine them."

The Court: Yes.

Mr. Shryock: And I simply say that I feel it is unfair [996] after we practically prepared his case for him to say that we have misled him.

The Court: All right.

Mr. Dennis: I haven't tried to imply that.

The Court: In using the word "prejudice" I meant results in prejudice, prejudice to the parties and that is not indicated here.

I am not going to re-open the case for the purpose of introducing new maps. If by reason of the map counsel was prevented from presenting some additional testimony now is the time to say so.

Mr. Dennis: The only thing I have in mind, your Honor, is I want to protect my client in this matter. We used the maps, necessarily had to in view of the fact that our expert was in Los Angeles and I live in Fallbrook, we had to use the maps which were presented as our working papers. As your Honor will recall I said that to a large extent the defendants were going to have to rely on the evidence which was going to be introduced by the plaintiff.

Now, because of the small size of their maps there may have been things on them which were impossible for us to see.

The Court: Mr. Conkling has a good imagination.

Mr. Dennis: If your Honor please, yesterday it was agreed that Mr. Hall would furnish us with the second page of the map which we introduced into evidence yesterday, which [997] we obtained from the Division of Water Resources. This morning he told me that because of the character of the map that he has in his possession it is only possible to make a photostatic copy of it and I would suggest this, that with plaintiff's consent the tracing, the original tracing is in Sacramento, that we have the Office of Ground Water Resources make a copy of that tracing and send it to the clerk and when it is received it will be entered in evidence.

The Court: Let us give it a number now.

Mr. Dennis: That will be part of Defendants' Exhibit —

Mr. Shryock: Did you say "Office of Ground Water Resources"?

Mr. Dennis: Division of Water Resources.

Mr. Shryock: At whose expense?

Mr. Dennis: We will pay the expense, naturally. We could either give that a number or it could be attached to the map which is already in evidence and of which it is a part—

Mr. Shryock: No objection.

The Court: What exhibit number is it?

Mr. Dennis: Defendants' Exhibit F.

The Court: All right.

(The document referred to was received in evidence and made a part of Defendants' Exhibit F.)

Mr. Dennis: Now, I believe yesterday in putting in the application of the Santa Margarita Mutual Water Company and [998] the United States Navy we didn't agree as to the dates they were received. They bear a notation, the date of which they were filed with the Division of Water Resources, but I think we can have a stipulation they were filed on the date they were received.

Mr. Shryock: I think the court indicated that yesterday.

Mr. Dennis: That was on one of the protests, I think.

The Court: All right.

Mr. Dennis: I would like to recall Col. Robertson for just two questions.

The Court: All right.

ELIOTT ROBERTSON

having been previously sworn, resumed the stand and testified further as follows:

Cross Examination

Q. (By Mr. Dennis): Col. Robertson, I believe it is possible for Camp Pendleton to secure water from the Metropolitan Water District by means of the San Diego aqueduct, is it not?

Mr. Shryock: If you feel qualified to answer these questions you may.

The Witness: I have never had any negotiations

(Testimony of Elliott Robertson.)

with the Metropolitan Water District. However, I have followed closely, by correspondence and direct consultation with folks who have in our behalf. We have never been able to have the [999] Metropolitan Water District offer us a firm supply of water.

Q. (By Mr. Dennis): There are other marine installations in Southern California who are acquiring water from either the Metropolitan Water District or from the San Diego County Water Authority, is there not?

A. There is one Marine Corp installation which acquires water from the City of San Diego.

Q. Does not the El Toro Marine Base also obtain water there?

A. That base is under the management of the Bureau of Aeronautics of the Navy Department. I know of the arrangement there. It is not in a true sense a Marine Corps establishment in that we do not finance or manage it. We are not the owners and operators. [1000]

Q. Colonel,——

A. Their contract there, as I remember it, having seen it, is for an off-peak supply of water.

Q. Colonel, you know, do you not, there is a contract involving the Colorado River water, which makes available to military installations waters which may be diverted from the Colorado River, from the metropolitan districts, the metropolitan water districts?

A. Will you read that question?

(Testimony of Elliott Robertson.)

(The question was read.)

A. I do not.

Q. You are not familiar with such contract?

A. I am not familiar with any contract of that nature.

Mr. Dennis: That is all.

Mr. Shryock: Thank you, Colonel.

The Court: All right.

(Witness excused.)

Mr. Dennis: I think the defendant rests, your Honor.

The Court: All right.

Mr. Dennis: I might call your Honor's attention to this, before I rest, and that is that in the pre-trial order there were two applications which were referred to and which we included at the request of the plaintiff. The defendant Santa Margarita Mutual Water Company does not feel it necessary to its case to put those applications in [1001] evidence. However, they are available, if the plaintiff desires to put them in evidence.

The Court: Yes. Now, I am going to take a short recess.

Mr. Shryock: Yes, sir.

The Court: Are you going to have any rebuttal?

Mr. Shryock: May I answer that question, your Honor, when we return from the recess?

The Court: Yes, sir. That is why I said I would take one.

(A short recess.)

The Court: All right.

Mr. Shryock: If the court please, the plaintiff does not wish to offer any further evidence.

The Court: All right.

Mr. Dennis: If the court please, I would at this time make a motion to strike Plaintiff's Exhibit 3, which consists of 15 subdivision numbers, which is the climatic data. At the time that it was introduced, I made an objection, and at that time I think it was anticipated that the plaintiff was going to use it and have some of the witnesses refer to it. There has been no reference to that. It does contain a great deal of printed matter which has no bearing and no relevancy in this case, and I don't know what the purpose was in having introduced that particular exhibit.

Mr. Shryock: May I answer that, sir? [1002]

The Court: Yes.

Mr. Shryock: I think that the court made it clear that if the bulk of the exhibit or the cost of it on appeal was too great, that there was a way by which it could be physically taken up to San Francisco. We have had testimony as to the nature of the rainfall and the nature of the area, and I refer particularly to statements, for instance, of Mr. Hall as to the rainfall shadow of Palomar Mountain. We think the exhibit is revelant. What Mr. Dennis objected to was that certain pages were not extracted, as we did in Exhibit 14 and which we would have been glad to do had he said something about it 21 months ago.

Mr. Dennis: We did, but the Commander was not there at the time.

The Court: I think the exhibit will remain. If there are any legends which merely express opinions and do not state facts, they may be disregarded.

As you know, gentlemen, this is a suit in equity, and ever since the beginning of equity, the rules of evidence did not apply with great strictness, because the chancellor, being the keeper of the king's conscience, and being to start with a clergyman, he only later became a lawyer, was supposed to disregard anything that was not relevant.

I remember the first three-judge case, in which I sat with Judge Wilbur, who was also Secretary of the Navy once, [1003] and which involved, as do most three-judge cases, injunctive process against state legislation. We had to hear testimony, and somebody raised the point that certain matters were not relevant, and Judge Wilbur said, "We will receive it. We know what to disregard."

At the present time the trend is to apply that rule in all cases. In fact, there is a statement by the late Judge Garrecht of the Ninth Circuit in one of the cases that when a case is tried without a jury you can rely upon the assumption that the judge will not consider anything that is irrelevant, even though it may have gone into the record. And I think that is a very wholesome attitude toward the process of proof in our courts.

So, if there are any legends on any of these exhibits which on close examination should prove to be matters of opinion rather than statements of

fact, I will disregard them, whether you call them to my attention or not.

Now, gentlemen, I have a plan, which I want to discuss with you, in regard to the argument. As you know, I am a great believer in oral argument. Even if after oral argument I ask for additional briefs, I want oral argument anyway.

I think at this stage particularly oral argument will be very helpful, because I think you will agree with me that the most fundamental legal principles have been decided in the opinion rendered, right or wrong, and the question now [1004] is more of a question of the application of the particular principles that are declared to the facts in the case.

It occurred to me that you ought to have time, and I should have a little time, to go over in greater detail some of the exhibits which have been introduced, and with which I have familiarized myself only in rather a hasty manner.

You have a complete transcript, and I have a copy of the transcript. But I never look at it. I never look at the transcript until after the argument is over, when I want to formulate my ideas, in order to find some specific data. And many a time in writing an opinion I have relied on my own memory, and only then gone to the transcript to see if my recollection was correct.

My thought is this: that we adjourn until Tuesday of next week, and that at that time we have oral argument. If in conjunction with your oral argument you desire to present to me a sort of outline of your argument and any additional cita-

tions you desire to refer to, you may do so. Mr. Dennis has said he desires to argue a point which, so far as I remember, was not argued before, or, at least, I did not cover it, as to the relation of tributaries. Didn't you say you wanted to argue the relation of tributaries?

Mr. Dennis: That is correct, your Honor.

The Court: Now, those can be presented in that form. Many a time counsel came with a sort of brief of the argument [1005] as they call it, and then start from there, and then the court has the benefit of the summary. Then we have the cases there, and you do not have to stop and read them all, but you can read one and quote from it, and then refer to the others in the memorandum. That is a method that I have followed many a time in cases of this character.

Now, if that is satisfactory, then you will have the entire week end, including Monday, in which to marshal your facts, and if you desire to present a memorandum in connection with the argument, that will be all right. Then, if it should develop that some additional briefs are desirable, I will so inform you at the time.

What say you, gentlemen?

Mr. Shryock: I certainly will attempt to comply with what your Honor has suggested.

Mr. Dennis: I think that is an excellent way, your Honor. There is just this thought. Do you think we might argue the facts first, and have your Honor give us your conclusions as to the facts, and then argue the law afterwards?

The Court: That would be splitting it up.

Mr. Dennis: It makes it somewhat difficult perhaps sometimes to know as to how far we should go in our legal argument.

The Court: It is very difficult to determine a case of this character at the conclusion in any particular time. [1006]

Ordinarily, in the course of an argument, I generally indicate my reaction to certain things in a case. That ordinarily, of course can be done. At times, when you are not prepared, you have a situation where I get a certain impression of a case. For example, last Monday in a bankruptcy matter I was very emphatic when I said I didn't have much sympathy for a farmer who had been operating under the Frazier-Lemke Act for a long time, and should now be barred. I was very emphatic in my thought, but on studying the cases I found it did not make a bit of difference, that he was entitled to the benefit of the section which says that he is entitled to an appraisal and re-appraisal before it could be sold in bankruptcy, and so I am now writing an opinion talking myself out of that hasty statement that I made. I told counsel, frankly, that because I had been away, out of the district, I had not been able to study the memoranda, as I usually do, in advance of argument.

So I do not think we can split this, Mr. Dennis, in that manner. You can argue both. You can argue on a supposition.

I think the argument in this case will be rather narrow, because, in the first place, we have to

make a finding as to what the riparian rights of the Government are, the use to which the water is being put, the amount of water which is being used now, and the amount of water which, under the Code, [1007] the constitutional amendment of 1928, they might be entitled to if put to the fullest use. That is the fundamental issue.

Now, incident to that are such questions as you have raised, as to whether water is being taken out of the watershed. Then that is tied to the problem as to whether it has been used historically before you filed, so as to create a prescriptive right to a non-authorized use.

Then we come back to the proposition as to what is the flow of the river, and what is available, and is there a surplus which is subject to appropriation. In your case the facts are not complicated by any diversion, because you have made no diversion. So, to my mind, that is all there is to argue.

There may be incidental questions, such as what has been called the historic use of water, and what rights have accrued by reason of that, and you had something about questioning the right of the Vails and Santa Margarita agreeing by contract how to divide the water. [1008]

The question to my mind as I view it now is an abstract question because the testimony in the record is that they would be entitled—strike that. That by this contract they have reduced the amount of water which they could use.

Mr. Dennis: I think perhaps when I objected, your Honor, in the first instance I was wrong.

It is still my position that any party who is not a party to that judgment and privy to it is not bound by it. On the other hand the judgment is in evidence. It is an existing judgment. It is an existing agreement and therefore I think it limits the Vails' prospective rights of water.

The Court: Our code specifically says that a judgment is a contract. The Code of California has contained that provision ever since the code was adopted, so regardless of its effect as a judgment it certainly is an agreement limiting the rights between themselves and if as my impression is they actually by this stipulated judgment are taking more water than they would be entitled to then its effect on the others becomes unimportant because if it didn't exist you wouldn't be entitled to what one riparian owner has surrendered to the other. It doesn't affect the surplus as far as you are concerned.

Mr. Dennis: Only indirectly, your Honor, in this, that in figuring what their prospective uses might be it limits the future prospective of water on that ranch. [1009]

The Court: Yes, it might.

Mr. Dennis: At least the judgment being a binding agreement, being in full force and effect, so long as it is in full force and effect the Vails' rights are limited by that judgment and therefore their prospective rights would be limited by that.

The Court: That is right, I agree with you on that. But you see we have not gone into that. You are talking of possibilities. We have talked merely

about the possibility of further development for agricultural purposes in order to find the maximum allowance and to see if the substituted use can take it. That is what we are confronted with in this lawsuit.

Mr. Dennis: I assume that a lawsuit of this character and the numerous issues that we have that we won't be limited in our argument to any particular length of time.

The Court: No. You see, gentlemen, you have surprised me. I knew you would. I have always said this lawsuit is going to be a friendly lawsuit. I turned it into a friendly lawsuit myself—so far anyway.

Mr. Dennis: So far as the present defendants are concerned.

The Court: And secondly I felt that the pretrial work and the opinion which I wrote at your request, gentlemen, has settled in advance most of the questions of law. I cleared [1010] my calendar for the entire month with the exception of such matters as I have to take up on Mondays because I do not want other judges to do my work and besides it is more convenient for you.

You can go home over the weekends and be with your families and stay there rather than come back on Mondays.

But, I will give you all the time you want. If you want to reserve two days or a number of hours you may do so.

I want to say this, argument is very tiring both on the judge and on the reporter. About four hours

of solid argument is about all you can put in safely in a day.

Now, I am willing to allow four hours for each side and then spread it over two days, Tuesday and Wednesday.

Mr. Dennis: I think it might be necessary to take longer than that, your Honor, to develop all of the issues that are here.

The Court: How many hours do you want?

Mr. Dennis: I don't know until I hear what plaintiff has to say. I am still in the dark as to his theories.

The Court: I have listened to argument for many days. I know one case we listened to argument for seven days, but that involved \$100,000,000 in the Naval Reserve in the Elk Hills litigation. There was very little testimony in that case and all I had was a record of administrative hearings. We had five days of argument there. There was Judge Preston, [1011] Mrs. Adams, who is now Judge Adams, Mr. Prince of San Francisco, Mr. Donald Richberg and several other persons. That hearing was in Fresno.

I merely want to get an idea of how much time you want. I will give you five hours to each side. We can put in five hours all right.

Mr. Dennis: I am not in a position, of course, to estimate my time until I know what points are going to be advanced by counsel for plaintiff.

Mr. Shryock: You are back again, Mr. Dennis, to where you want us to tell everything that is going to be done ahead of time.

Mr. Dennis: I still don't know whether you claimed by virtue of riparian rights that you have a right to the use of water outside the watershed, for instance.

Mr. Shryock: I see. I think the record will show what we claim. I can only say this, your Honor, that I think four hours to a side is a most generous allowance.

The Court: Well, I will tell you what we will do. I will allow two days and we will try to divide those two days into five hours each and then if you find it cannot be concluded we will go over to Thursday.

I am not trying to limit you. I merely have found if you have unlimited argument you get into difficulties. I would rather give you more time than you may want and not use than not give you enough time. [1012]

I have no desire to curtail you. I am not going to clock you.

Mr. Shryock: I think Mr. Dennis might find that he might be even able to use some of my five hours.

The only thing that I have any reservation about is the fact he changes so frequently. Now, for example, this hated stipulated judgment which he now clings to with such deep affection. That is a complete change. And of course I may have to be prepared to meet those changes.

The Court: I know Mr. Dennis better than you do and I know very well that he is not dogmatic

enough to stick to an idea if he feels that his client is not going to be benefited by dogmatism.

Mr. Shryock: That is true. I think we can make out very well on the schedule that the court outlined.

The Court: All right, let it stand to be an average of five hours to the side.

Mr. Dennis: Thank you.

The Court: And we will begin Tuesday morning at 10:00 o'clock.

Mr. Grover: Your Honor, I think I may not have been as precise as I might have been yesterday about the State's cause. It is understood that the case is open so far as our proprietary rights are concerned. We have every expectation of settling that amicably. [1013]

Mr. Shryock: He is speaking of the teaspoon users capacity and that is understood.

The Court: That experimental station you were talking about?

Mr. Grover: Well, there are some fire control stations and school lands and there is a problem of the tax deeds and the escheated lands which we may have to work out and those change daily because of redemptions.

The Court: All right, if there are any issues relating to the proprietary interests of the state, as to the ownership of the land, and they are not settled by stipulation we will keep it open for future determination.

Mr. Grover: Thank you, your Honor.

Mr. Dennis: If your Honor please, just one

other thing. You remember sometime back you extended the time for the defendants who have not appeared, to January 1st.

The Court: Yes.

Mr. Dennis: We are rapidly approaching that point. I have had enough problems in connection with this particular phase of the litigation so that I have done nothing and I know a lot of people would appreciate it if their time is again extended for another 90 days.

The Court: All right, I have no objection to that. What was the late date?

Mr. Dennis: Either December 31st or January 1st. I have [1014] forgotten the form. It is as to the defendants who have not answered.

Mr. Dennis: The defendants who have not appeared will not be required to appear until a certain date and I think your Honor added that no defaults would be taken.

The Court: That is right. All right, we will make it March 31st.

Mr. Dennis: Thank you, your Honor.

The Court: Then the order will be that the time to answer for any defendants who have not appeared is extended to March 31st and no defaults will be taken on anyone prior to that date.

Mr. Shryock: Thank you, sir.

The Court: All right, gentlemen, then we will see you Tuesday.

(Whereupon, at 11:50 a.m. a recess was had until 10:00 o'clock a.m. Tuesday, November 25, 1952.) [1015]

Tuesday, November 25, 1952, 10:00 a.m.

The Court: Are there any ex parte matters? Cause on trial.

Mr. Dennis: If your Honor please, I have two things to take up before the argument. One is that on page 878 of the transcript I stated: "I also have a copy of the Navy's application to appropriate waters of the Santa Margarita River which was filed with the Division of Water Resources, the State Engineer of the State of California, which was prepared by the Attorney General's office in co-operation with the Division of Water Resources, and copies of letters," and then three letters amending the application that I offered to the clerk which is in evidence as Exhibit K—is the amended application rather than the original application and I would like at this time with the plaintiff's consent, to substitute the original application, which was the document which I thought I handed to the clerk.

Mr. Shryock: No objection.

The Court: The corrected document will be substituted.

Mr. Dennis: The other matter is this. Since we recessed I had an opportunity to secure a copy of the petition or supplemental petition for writ of mandate which was filed with [1018] the Ninth Circuit Court and I had an opportunity to read some of their authorities and I have discussed the matter with counsel for plaintiff and I believe it would be well, in view of some of the cases which were cited by counsel for the petitioners, if the record should have some evidence that Mr. Agnew is representing

the United States as special assistant to the Attorney General. I believe he has some documentary evidence——

The Court: That was taken care of by a regular substitution.

Mr. Dennis: I don't believe there is anything in the record except an oral statement, your Honor.

Mr. Shryock: That is correct, and apparently the court is willing to accept Mr. Agnew's statement that he had been designated as a special assistant to the Attorney General.

At the time he made that statement he was in possession of an original letter signed by the Attorney General of the United States designating him as a special assistant.

The Court: Gentlemen, I can settle the matter by stating that those copies were attached to the response which I filed in the Court of Appeals. They came with the response and a printed copy has the designation and I will read it into the record.

Mr. Dennis: I wasn't familiar with the response. I haven't seen any of the documents except the supplemental [1019] petition.

The Court: I may say this, gentlemen, they sent me two copies, one for my file but I returned one to Mr. McNearney. [1020]

I attached to it also an affidavit of mailing.

I will read into the record, gentlemen, Exhibits B, C, and D, and this will give me an opportunity to make some observations I want to make before you begin the argument.

Exhibit B, which is attached to the response made by me to the order to show cause issued by the Court of Appeals for the Ninth Circuit, No. 13599, is a copy of a letter addressed by the Attorney General of the United States to the Secretary of the Navy. It is dated August 11, 1952:

“Honorable Dan A. Kimball,

Secretary of the Navy, Washington 25, D.C.

Mr. Dear Mr. Secretary: This will refer to the case entitled “United States of America vs. Fallbrook Public Utility District, et al., in the United States District Court for the Southern District of California, Southern Division. The Congress of the United States in the Department of Justice Appropriation Act, 1953, approved July 10, 1952, 66 Stat. 556, section 208 (d), prohibited the expenditure of funds of this Department in the preparation or prosecution of the subject case. In the absence of funds this Department could not, of course, continue to prepare for or proceed to trial.

“This Department has been advised that due to the great importance of the litigation it is the desire of the Navy Department and the Marine Corps [1021] that the case should proceed. In recognition of that urgent necessity this Department is willing that the case go forward but in order to comply with the will of the Congress, the Department of the Navy must bear all of the costs in connection with the preparation and prosecution of the case. The Department will be glad to qualify your attorneys as Special Assistants to the Attorney General

without compensation other than that received from the Navy Department.

Sincerely,

“/s/ JAMES P. McGRANERY,
Attorney General.”

Exhibit C is a letter dated September 9, 1952, from Ross Malone, Jr., Deputy Attorney General, to Mr. David Agnew. It reads:

“Mr. David W. Agnew,

Department of the Navy, Washington, D. C.

“Dear Sir: Simultaneously with the delivery of this letter there is being delivered to you your appointment as a Special Assistant to the Attorney General, authorizing you to act in that capacity in the handling of the case in the United States District Court for the Southern District of California, [1022] entitled ‘United States of America vs. Fallbrook Public Utilities District et al.’ It is specified in your appointment that you are to serve without compensation other than such compensation as you may receive as an attorney for the Navy Department.

“Your attention is invited to the restrictions included in Section 208 (d), Title II, Public Law 495, 82d Congress, 2d Session, approved July 10, 1952, which prohibits the expenditure of funds of the Department of Justice in the preparation or prosecution of this case. You are, therefore, specifically advised that under no circumstances are you authorized to incur any obligation or expense insofar as the Department of Justice is concerned in

connection with the performance of your duties under this appointment.

“Very truly yours,

ROSS L. MALONE, JR.,
Deputy Attorney General.”

Exhibit D is dated September 9, 1952, and it reads:

“Mr. David W. Agnew,
Navy Department, Washington, D. C.

“Dear Mr. Agnew: You are hereby appointed as a Special Assistant to the Attorney General in [1023] connection with the case entitled ‘United States of America vs. Fallbrook Public Utility District, et al., in the U. S. District Court for the Southern District of California.

“You are to serve without compensation other than that received as an attorney of the Navy Department.

“You should execute the required oath of office.

“Respectfully,

/s/ JAMES P. McGRANERY,
Attorney General.

“By the Attorney General: “(Signed) Ross L. Malone, Jr., Deputy Attorney General.”

I presume Mr. Agnew took the proper oath and qualified?

Mr. Agnew: Yes, sir.

The Court: Now, gentlemen, I had no notice of these additional proceedings until I read the Times, the Los Angeles Times, of Friday, in which the United Press carried a story, giving a summary of

the response which I had made, and in that story there appeared this paragraph, which I shall read:

“At the same time, the Ninth Court of Appeals refused to file Fallbrook’s supplemental petition asking that besides the court, Justice Department [1024] and Navy officials be ordered to show cause why the trial, now proceeding against the Santa Margarita Mutual Water Co. and the State of California, as an intervenor, should not be stopped.”

It is quite evident that they discovered too late that they could not do anything except as to the particular party which sought the writ. Even now they have not made the Santa Margarita Mutual Water Company or the State of California parties to the action, either by making them respondents or even by giving them notice, so I am not afraid, gentlemen, of anything we have done. But I do not want to have wasted the time of the Santa Margarita Mutual Water Company and the time of the State of California and my judicial time. So in this case there will be no briefs filed. In other words, I am going to see to it that Mr. Agnew and Mr. Shryock, if some new writ is sought, will not be working on the case, that I will be the only one working on the case, so there will be nothing to stop me from deciding it, and I may decide it after the arguments are concluded. Frankly, I am certain they are going to try all sorts of things, because, despite all protests to the contrary, I am certain Mr. Swing’s client is determined not to have this cause tried, not only as to him, but as to anybody else. But he will have to have a better writ than

he had last time to undo the work that we have done. [1025]

So, gentlemen, we will proceed with the argument.

There is a matter which has arisen which may require me to change our hours. I should never make promises over the long-distance telephone, but when you are away from your own court you are not in a position, when somebody calls you on the long-distance telephone, to act. I was asked by the Secretary of the Treasury to induct into office tomorrow morning certain new officials, whose names have not been announced yet, who are to be appointed under this new reorganization of the Internal Revenue Department. I thought when I made the promise to do it that the proceedings would be held in this court house or, at least, in the State Building, so that our work would not be interrupted for more than a few minutes. However, I find that, because of the large number of people who have been invited, they are going to hold it at U. S. C. in Hancock Hall, which will require my going out there and coming back. That will cut our session in the morning. However, we will convene tomorrow at 1:00 o'clock and then put in the rest of the day. I will determine today whether today's noon session should be cut also, depending on the status of the argument.

The holiday, Thanksgiving Day, will be here, and, if it is necessary to carry over the argument to the following day, it will be all right with me. But I am hoping that it will not be necessary, so that

there will be no break in the [1026] continuity of the matter.

I may say that over the week end I have examined the exhibits which the clerk placed in my library, and I have a better knowledge of some of the things in the writings than I had before. So I am ready to proceed with the argument at the present time.

Mr. Grover: Your Honor, I should like at this time to make a couple of corrections in the record. Commander Shryock has prepared a list, but his list did not quite cover it, and I thought we might do it now.

The Court: All right.

Mr. Grover: At page 1013 of volume 9, line 23, the word "over" appears in place of "open." The record reads, "the case is over," and it should read, "the case is open," and I believe that is what I said.

Mr. Shryock: I am sure you did.

* * * * * [1027]

Monday, April 6, 1953, 10:00 a.m.

(Other cases called.)

The Clerk: No. 23 on the calendar, 1247 Southern Division, United States of America vs. Fallbrook Public Utility District, et al. Mr. Shryock is present, Mr. Dennis, and Mr. Grover.

The Court: Gentlemen, I have examined this motion, and no memorandum in opposition has reached my desk.

I think perhaps the nature of the case is such that I ought to make a statement, and then I will hear from the Santa Margarita Water Company

and the State, because the idea of allowing the defendant in this case the exception under 54(b) was prompted by a desire on my part—you may sit down, Commander Shryock. I will take a little time. I brought some books here, and I want to put some law in the record—was prompted by a desire on my part not to embarrass the Santa Margarita Mutual Water Company, which very graciously, along with the State, consented to have the case tried, and did not join the Fallbrook Public Utility District in endeavoring to prevent trial.

I did not want to embarrass them by a possible situation that might arise where they might have to appeal a case piecemeal, so I made the reference in the opinion, and I put in an order that the judgment to be entered shall have [2] the benefit of the provisions of 54(b), which is a new section which was added by what are known as the 1946 amendments. They really were adopted late in 1947, at the end of the session. That provides that if a judgment is upon multiple claims the court shall not direct the entry of a final judgment unless the court makes a determination that there is no just reason for delay and upon an express direction for the entry of judgment. Then the rule continues:

“In the absence of such determination and direction, any order or other form of decision, however designated, which adjudicates less than all the claims shall not terminate the action as to any of the claims, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims.”

The Court of Appeals for the Ninth Circuit has had occasion to interpret this section in a very recent case, the case of *Wan vs. Black*, decided on May 3, 1950, with Judge Mathews writing the opinion. Judge Mathews is the man on that court who writes all procedural opinions, because he has made procedure a special hobby. So you will find that 90 per cent of the opinions relating to procedure are written by Judge Mathews. In fact, I have four here, and every one is written by him, one way back 10 years ago. [3]

In the *Wan vs. Black* case an opinion was filed, but no final judgment was entered. The notation in the book was entry of a partial summary judgment. This arose from the District of Hawaii, Judge McLaughlin. Judge Mathews held that there was no final judgment, and no certificate, and, therefore, the order was not an appealable order, in the absence of such certificate.

In this particular case counsel for the Santa Margarita Mutual Water Company filed an appeal and notice of appeal after the opinion and the order for findings were filed. Mr. Grover called on me with that notice of appeal, and called my attention to the appeal. I tried to show him that the appeal was premature, and that the opinion was not a judgment, and no judgment was entered. The order was of the type which I enter in complicated cases, directing judgment and designating certain specific findings. The object is to reduce the argument to a minimum, as to what I decided. Sometimes lawyers read an opinion and they will not agree as to the facts that

I have decided. So in the Richfield case, in the Standard Oil case, in the ordinary antitrust cases, and other cases of that character, I supplement the opinion by saying, "Formal judgment and order to follow." And in this case it said, "Judgment to follow based" upon so many findings.

Now, I am satisfied that appeal is premature. There [4] are other cases in addition to the case I just cited. That case says that there must be compliance with the provisions of Rule 79(a), which provides that the clerk shall keep a judgment book, in which such judgment must be entered, and that no judgment, no matter how designated, can be considered a judgment on which appeal lies unless it is entered and docketed as such.

Now, Judge Mathews says that in this particular opinion, and here are two more, including a later one in which I participated when I sat last year on the Court of Appeals. One of the new cases which arose under the new rule is *Wright vs. Gibson*, 128 Fed. 2d, 865. It is a Ninth Circuit case. I am not taking the trouble to cite any other cases, because when it comes to procedure we do not need any other cases when we have law of our own.

In *Wright vs. Gibson* the late Judge O'Connor filed a written opinion, granting a motion to dismiss a certain count in the complaint. The opinion concluded with these words, "The motion is granted." Then the clerk of the court made an entry stating that the motions had theretofore been argued and submitted, and that "The court now files its opinion; and, pursuant thereto, said mo-

tions are granted." An appeal was filed, and the court said the appeal was premature, that there was no judgment, and the clerk's docket did not contain any entry of a judgment or a dismissal.

That case was followed later on by *Uhl vs. Dalton*, 1945, 151 Fed. 2d, 502. Again Judge Mathews wrote the opinion. In that particular case the court granted a motion to dismiss, and the court filed an opinion. This was from Nevada, Judge Norcross. Here Judge Norcross had filed an opinion, and concluded it, but did not "find the facts specially and state separately its conclusions of law thereon and direct the entry of the appropriate judgment," nor was any judgment entered. The court said:

"The opinion was not a judgment, nor did it direct the entry of a judgment. Instead, it declared that neither party was entitled to a judgment, and, immediately following that declaration, ended with these words 'It is so ordered.' Thus, instead of directing the entry of a judgment, the court, in effect, directed that no judgment be entered."

Then Judge Mathews goes on to say:

"That was not a notation of a judgment, within the meaning of Rule 58 of the Federal Rules of Civil Procedure, * * * and hence did not constitute the entry of a judgment."

Last year I sat with them in a case which arose from San Diego, *Weldon vs. United States*, 196 Fed 2d, 874. [6]

There a man had brought an action to suppress evidence. At first we were inclined to take the view

that as the evidence which they wanted to have suppressed related to an action before the Commissioner, there was no action before us. Finally, we got around to Judge Mathews' specialty, and here again he said there was no judgment, because there was just a minute order denying the motion to suppress, and there was no entry in the judgment book.

Now, these are the cases that I had in mind when I took the view that the appeal from the order here is premature. I do not desire, of course, to place my conception of the law above that of counsel. Counsel are anxious that no possible procedural mishap occur in the case, and if they think they are protected by that notice of appeal, it is all right with me.

In passing upon the findings, I took the trouble to point that out. And, incidentally, I have just read proof on it, and I have added the citations to the little memorandum which I filed, and which will be published in Federal Supplement, along with the findings. I thought the memorandum was adequate, insofar as it referred to the various sections, but it was not adequate because it did not refer to these cases. I took it as a matter of course, and unless learned counsel can agree as to what is and is not a final judgment, I thought I had better put some higher [7] court authority back of my memorandum, which I did this morning. The proof has gone in to the West Publishing Company with those corrections.

I am making the statement for this very reason:

in view of the anxiety of counsel as to disavowing the intention, I cannot see at the present time any advantage to be gained. I am quite certain counsel are not going to accept my view now. The appeal is pending. It can be dismissed, of course, before it is docketed, and, frankly, I had the clerk communicate with counsel, and I thought at one time they might authorize dismissal. It still can be dismissed before it is docketed. I think there is a subdivision of Section 57 which says that on stipulation of the parties it may be dismissed. So there is no advantage to be gained.

I am merely saying that because at the present time, unless some good reason is given to me, I cannot see why this case should remain here and abide the conclusion of the litigation with the Fallbrook Public Utility District, which is set in the near future, but which may not be concluded for many months, if it ever gets started.

I have not received the mandate. Evidently they are waiting the 30 days, although this is a special proceeding, and the 30-day clause does not apply. The mandate may come down at any time, and I may spread it, and when I do, nothing can be done further until some order is secured from the [8] Supreme Court in Washington.

So I think I will hear from Mr. Dennis and Mr. Grover as to why, in view of their attitude towards this case, the certificate which the Government requests should not be filed at the present time, so that the Government would know that, so far as the phase of the litigation between it and Santa Mar-

garita is concerned, the matter might just as well be up for review in the higher court, because it is a partial adjudication and not dependent upon the adjudication of the rights between Santa Margarita and the Fallbrook Public Utility District.

Now, having made that full statement, I will hear from Mr. Dennis and Mr. Grover.

Mr. Shryock: If your Honor please, may I say one word before they begin?

The Court: Yes.

Mr. Shryock: There is a circumstance which has arisen, which I feel should be brought to the court's attention, and that is that after this motion was filed the Undersecretary of the Navy wrote a letter to the Chief of the Army Engineers and to the Department of the Interior, with copies to all of the defendants in this case, in which he indicated that he wanted, if possible, to have the various experts get together as to the yield of the Santa Margarita River, pending possible negotiations for the settlement of [9] any dispute with the Fallbrook Public Utility District.

Consequently, I am now here, your Honor, asking not only on behalf of the United States, but on behalf of the Fallbrook Public Utility District—and I talked to Mr. Swing on Saturday of last week, and he joins in this—that the trial, which is now set for April 28th, be set over until sometime in the early part of July of this year, at such date as may suit your Honor's convenience,—Tuesday, July 7th, or Tuesday, July 14th, or whatever other date might suit your Honor's convenience, and I

feel that has such a direct bearing on the motion that is before you that that should be brought to your attention at this time.

The Court: Gentlemen, I have no objection to continuing the case when all of the parties that are interested in it desire a continuance, but I do not see that the present motion could be affected by that.

Mr. Shryock: No, except it does seem to me, your Honor, that it would make it even more difficult, if the defendants have any objection to the finality of the judgment, to assert that objection in view of a continuance until July, because they certainly must docket one of their appeals at some time or another, and it does seem to me, with the going unsettled dispute against the Fallbrook Public Utility District, they having demonstrated their appetite for appeal, they certainly would find great [10] difficulty in objecting to it at this stage of the proceedings. So, as I say, we request that a minute order be entered continuing the case to such date as your Honor may find convenient.

The Court: What do you desire to do with this motion?

Mr. Shryock: As far as the motion is concerned, we ask the court to grant the motion.

The Court: All right. As I have already intimated, I was going to trail the case another week, but if you want a later date, all right. I would rather, however, put it down for the end of June sometime, because August is our vacation month—

Mr. Shryock: Yes, sir.

The Court: —and if we cut into it, it disorganizes the court, especially my work as a chief judge. I have to be back early in September because I have to select a new petit jury and a new grand jury, and this is the type of case which, once it is begun, it cannot be continued with safety.

Mr. Shryock: Yes, sir. I think they also had in mind the setting of it in July to obviate any fiscal year questions that might arise.

The Court: Oh, I see.

Mr. Shryock: And July 7th is a Tuesday.

The Court: The Court of Appeals, through Judge Denman, [11] did a very thorough job in analyzing that situation.

Mr. Shryock: Yes, sir.

The Court: I think this new Congressman from Santa Ana ought to have a copy of it, and perhaps he would modify some of the speeches which he has been delivering. That is Mr. Ott. I might as well name him. I know he joined with Mr. Swing in saying I ought to be disqualified. I did not know that Congressmen who were not litigants in the case could tell Federal judges what to do about a case. I thought when it came to the Declaration of Independence one of the grievances against King George was that he wanted to make judges subservient to his will. Evidently some Congressmen do not realize that it is as bad to make a judge subservient to the Congress. I think he even threatened to stop my salary, but he hasn't stopped it yet. I had to bring that in, because some of the statements in this case that are appearing in the newspapers and made

publicly are ridiculous if you actually followed the litigation itself.

Now, you want the case continued until July?

Mr. Shryock: Yes, your Honor please, as to the separate trial against the Fallbrook Public Utility District.

The Court: All right. When do you want to pick it up? The first Tuesday in July would be all right.

Mr. Shryock: That is the seventh. [12]

The Court: The seventh. You want it for that date?

Mr. Shryock: Yes, sir.

The Court: All right.

Mr. Shryock: One final word, that may help in clarification so far as the present motion is concerned. I feel that on the state of the record it is quite clear that the judgment entered against the State of California as the defendant in intervention is against the State in its sovereign capacity and as *parens patriae*, and I think the record is clear that the matter of proprietary interests in any land which the State may have in the watershed has been left open.

However, I should like to make it clear that the United States is willing to enter into any stipulation which will clarify that.

The Court: All right. I will hear from the other side. The setting for the twenty-eighth of April will be vacated, and the case of the United States *vs.* Fallbrook Public Utility District, and others, will be continued.

Mr. Shryock: Thank you, your Honor.

The Court: Mr. Dennis, how about the coffee cup

defendants? Isn't it time to make another order continuing the date to answer?

Mr. Dennis: I think it would be well to make another order to that effect, as to those who have been served or [13] may hereafter be served, say, until the first of August, in which to appear.

The Court: What was the last date fixed?

Mr. Dennis: It comes up before July.

Mr. Shryock: I think May 15th is the present date.

The Court: May what?

Mr. Shryock: May 15th.

The Court: And you want until August 1st?

Mr. Dennis: I believe August 1st.

The Court: All right. I have the prior order here. It is ordered that those of the defendants who have not appeared are granted until 5:00 p.m., August 1, 1953, in which to appear. That is exactly the previous order which I entered on March 3rd.

The Clerk: Was the trial continued to July 7th, your Honor?

The Court: Yes.

Mr. Grover: Your Honor, in opposition to the motion, first of all, we have no appetite for appeal, as Commander Shryock has expressed it.

As your Honor stated this morning, our purpose in taking this preliminary appeal was precautionary only. Frankly, I do not believe the order was appealable, but because of some of the technicalities in the case and some of the important developments in the case, we thought we could not [14] risk that.

As to the appealability of the judgment of Febru-

ary 24th, entered on the 25th, as it provides that under Rule 54(b) it is not final, we would not want to appeal from that. We like the situation as it is under that judgment, and we are contemplating appeal solely for precautionary reasons again. The 60 days have not expired, in which we may appeal, and it is possible that we will satisfy ourselves that it is not appealable, and hence we shall not appeal. There is certainly no election on our part, as represented in the points in support of the motion, and there is certainly no desire on our part, but we feel constrained to be as careful as we have been, to protect appellate jurisdiction.

On the merits of the argument itself, it seems to me that the essence of the State's position requires that we remain in at all steps of the case. We were invited to participate by the United States itself, in order to allay fears widely held throughout this part of the country that some untoward event, some usurpation of State rights or of property rights of individuals would take place, and our participation for that purpose is just as applicable as the trial as to the Fallbrook Public Utility District and the other 3,000 or so defendants, when it is time for them to be tried, as it is now. As a matter of fact, we are most [15] anxious to be present on behalf of those 3,000 defendants if they have not been ruled out of the case before then.

Secondly, it seems to us there was a preliminary understanding of everyone concerned, and initiated from the bench, that no damage would result from

the fact we didn't participate in the steps which were taken to obstruct the trial of the case.

It seems to me, under the developments that have now taken place, the Fallbrook Public Utility District alone will gain the advantage of the delay which the Fallbrook Public Utility District initiated. Settlement negotiations are now taking place in Washington, and this letter from the Undersecretary of the Navy is evidence of that, which will prove it is still in the case, and those who cooperated with your Honor and went ahead with the trial, if this motion is granted, will be injured by this action. More than that, the State has continued the investigation of the watershed of the Santa Margarita River, and the State engineers will participate in the trial as witnesses, and the new information which is available will benefit only those who are in that trial. We feel the State should be there to be benefited by that information.

I might add, too, that the State, as you will recall, made no direct case of its own at that time, and one of the reasons for that was that Mr. Dennis was the only representative [16] of any party at that time, and had his particular way in which he wanted to try his case, and although we had the interests of everyone concerned in mind, nevertheless, we believed there would be a later time when we could assist in representing those interests, and so we went along with Mr. Dennis' style of trial. And we would have tried the case differently, perhaps, if we had known that the people we are representing as parens

patriae would have been foreclosed, so far as our assistance is concerned, by that part of the trial.

The Court: I do not think that situation would be affected because it is understood that at all times you are in the court, there is no likelihood of my going out of this case. I will bank my judgment as a lawyer that I will stay in this case.

Mr. Grover: I understand that, your Honor.

The Court: I do not think any Court of Appeals will say that the observations which I made about the delays that were being sought is a disqualification of the judge trying the law suit. In other words, as I told Mr. Phil Swing, what M-G-M could not do to me, he could not do, either. And I stand by that. Only two litigants in my experience have tried to disqualify me, M-G-M and the Fallbrook Public Utility District. M-G-M was disposed of with one line, and if what I said during the course of [17] the trial about the delaying tactics here, which were so evident to everybody, is sufficient to disqualify me from trying the case, then I have to learn something more on the law of disqualification in the Federal Courts.

So I want to say that the likelihood of my continuing with the case, God willing, is very good. Of course, younger men than I am have been dying. But other than that, there is no chance of anybody scaring me out of the case, Congressman, or anyone else.

Mr. Grover: I will agree with that, but I am sure your Honor's mind is open to the evidence that is presented.

The Court: It is open as to anything I haven't decided yet. As to the legal questions I have decided, those are decided in that particular manner.

Mr. Grover: As to the legal questions, but there are factual questions on the watershed of the river, on which new evidence has been discovered since the trial.

The Court: Yes. I am just saying that, and you understand I have no particular feeling in the particular case. Of course, after you volunteer to take a case, it does not belong to you, and when they have everybody, including congressmen, beginning to meddle it is rather disconcerting. I have been a judge for 26 years, and nothing surprises me any more, and I get more surprises all the time.

So I am saying that in making any kind of a ruling as [18] to any of these things, I am handling it with the idea that I will remain in this case.

Mr. Grover: I appreciate that, your Honor, and we wish to have the benefit of your Honor's evaluation of the new evidence.

The Court: All right.

Mr. Grover: More than that, I can see no reason, no hurry on this, outside of the fact of this precautionary appellate procedure. And I may say, your Honor, it is very possible that before the 60 days run out, we will have satisfied ourselves, so far as everyone is concerned. Of course, I do have to consult with my superiors on this that your Honor is right, and we appreciate your Honor's assistance in research on the subject. We may satisfy everyone that your Honor is right and not take the appeal

that we are contemplating. But, certainly, because we are contemplating an appeal to protect appellate jurisdiction is no hardship——

The Court: However, here is the situation: All I would do under this motion is this: I do not have to correct the judgment. I will merely prepare a certificate saying that so far as the matters adjudicated in this particular portion of the case there is no reason for further delay.

Now, if you appeal notwithstanding that declaration, [19] you are not harmed, and if you do not appeal, you are not harmed. Certainly that will not foreclose you one way or another. You can still go on, because a declaration to that effect cannot harm either you or Mr. Dennis' client.

The section is worded very peculiarly. It says:

“When more than one claim for relief is presented in an action, whether as a claim, counter-claim, cross-claim, or third-party claim, the court may direct the entry of a final judgment upon one or more but less than all of the claims only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment. In the absence of such determination and direction, any order or other form of decision, however designated, which adjudicates less than all the claims shall not terminate the action as to any of the claims, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims.”

Mr. Grover: But that would force us to appeal then, your Honor. I mean the time would begin to

run then, and we would have to appeal within the 60 days. And notwithstanding that we have felt constrained to take this [20] precautionary appeal, we don't want to do that.

The Court: When do your 60 days expire?

Mr. Grover: The judgment was entered on the twenty-fifth of February. It would be up about the twenty-fifth of this month. I haven't computed the 60 days, but it would be about April 25th.

The Court: All right. Mr. Dennis, what do you have to say?

Mr. Dennis: I join with Mr. Grover in opposing the Government's motion.

The court will recall that both prior to the trial, and during the trial, the court stated from the bench that any judgment which might be entered in this matter, insofar as it affected the Santa Margarita Mutual Water Company or the State of California, would not be final and would not become final until such time as the case was tried against the Fallbrook Public Utility District, and that the judgment would contain adequate provisions to insure my clients that they would not have to appeal until the Fallbrook Public Utility District was required to appeal.

Not only that, but your Honor will recall that prior to the time that pretrial negotiations were entered into, and the two orders were made in regard to the pretrial proceedings, the court made a ruling that all of the [21] defendants were cross-complainants against all of the other defendants, and that it would not be necessary to file cross-complaints.

The Court: Judge Weinberger made that ruling.

Mr. Dennis: Judge Weinberger did, and your Honor affirmed it later.

The Court: That is right.

Mr. Dennis: I do not think that it is fair or equitable to place my clients in the position where they will have to take one appeal in regard to the Fallbrook Public Utility District, which is one of the other two large appropriators, and take one so far as the United States of America is concerned.

Also, I feel for the Santa Margarita Mutual Water Company at this time to take an appeal would result in an injustice and create additional and perhaps unnecessary expenses, especially in view of the fact that on the twenty-seventh of March, 1953, Charles C. Thomas, Undersecretary of the Navy, addressed a letter to the Santa Margarita Mutual Water Company, requesting that they appoint a representative to enter into negotiations with the Government, with the Bureau of Reclamation, and the United States Geological Survey, the Chief Engineers of the Army, and the Department of the Navy, in an effort to determine the safe yield of the stream and the size of the dam to be built on the stream. [22]

In that letter they appointed Lieutenant Colonel Elliott B. Robertson of the United States Marine Corps as the representative of the Navy to enter into negotiations with the Santa Margarita and some of the other defendants named in the case. And I think, in view of the court's express statement, both prior to the trial and during trial, that

the order or judgment made herein, so far as the claim of the Santa Margarita was concerned, would not be final, that the Government's motion should be denied.

Now, it is true we did appeal from the order of the court which was made, at the same time that the court handed down its opinion. I think prior to that time both counsel for the State and myself discussed the matter, and I think we are of the opinion that the order was not a final order, and that it was not appealable. However, certain other interests indicated to us that there might be some question as to its appealability, and we discussed the matter with a number of people who are very familiar with Federal pleadings, and so we felt we could not afford to gamble with our clients' interests. In other words, notice of appeal is jurisdictional, and if it happened to be an appealable order, and if there were certain things in the order which would foreclose us from an appeal upon the final judgment which would be entered, we felt constrained to protect our interests. [23]

Your Honor will recall that the United States originally made a motion before Judge Weinberger for a separate trial of the action as against the Fallbrook Public Utility District and the Santa Margarita Mutual Water Company, and that was opposed by both defendants on the ground that it was not a separate claim, but that, being a suit to quiet title, it was only one claim, and that the claim of the United States could not be determined without determining the claims of all other defendants

who might have any rights in and to the subject-matter of the property which they referred to in the complaint.

Judge Weinberger made an order ordering that there should be a separate trial, and consequently your Honor brought the State of California in as a defendant in the separate trial. We went to the Circuit Court on a writ of mandate, and the court denied it without opinion, so that unfortunately we do not know whether it was on the ground in their discretion to refuse to issue a writ of mandate, or whether it was on the ground they felt it was not a separate claim, or was a separate claim as to each.

However, we have not abandoned that position, and did not abandon it during the trial, and if we happen to be correct and if the court should hold, as one or two of the judges held, that it was indivisible, then the provisions of Rule 54(b) would not apply. That is the only reason [24] we took the appeal, or contemplated taking the appeal from the court's order. Therefore, we prefer not to have the judgment become final until such time as it is final as to the Fallbrook Public Utility District.

At the time we took the appeal we did, as your Honor knows, we presented to counsel a stipulation—counsel for plaintiff—a stipulation stating there would be no obligation to take any further proceedings, insofar as perfecting the appeal was concerned, with adequate provisions for an order, so based, with an order from this court and the Circuit Court, so that, in any event, we were protected.

The Court: I have ruled on that, haven't I?

Mr. Dennis: I don't believe the first one your Honor did. I think the first one, your Honor, was the one——

The Court: As to the docketing?

Mr. Dennis: Yes. Then we have to go to the Ninth Circuit.

In view of the fact that the United States is asking that we enter into negotiations in an effort to see if we can't settle the problems here, I think it would be a mistake to modify the judgment which has been heretofore entered, with the result that it would create an additional financial burden on the Santa Margarita Mutual Water Company, in the preparation of the record on appeal, and we respectfully request the court to deny the motion. [25]

The Court: All right. Commander Shryock.

Mr. Shryock: If the court please, I think Mr. Dennis is under a slight misapprehension as to the letter of the Undersecretary of the Navy. That letter was addressed to the Chief of Engineers of the United States Army.

It stated that similar letters were being sent to the Commissioner of the Bureau of Reclamation of the Department of the Interior, and to the Director of the U. S. Geological Survey of the Department of the Interior, and to those addressees it said it is requesting that "you designate a representative to confer with representatives of the other above-named agencies."

That is the letter to which Mr. Dennis is referring, and I can hardly believe that it can be inter-

preted that he was to appoint a representative of the Santa Margarita Mutual Water Company.

However, I am not suggesting for a moment that any talk of settlement with any defendant would not be appropriate. I am simply saying that it seems to me that for two years we have been attempting to get somebody to say we have some rights in the river, and, at last, the only forum that is appropriate for it has. But the finality of that has been delayed, and now in view of current developments, it may be delayed indefinitely, beyond any reasonable period, so we think that we are at least entitled to have [26] certain finality attached to the findings that have been made as to our rights against these particular defedants.

The Court: All right. Commander Shryock, you will prepare a certificate to the effect of no delay, and I will make this promise, that I will wait until the twenty-fourth of April, and counsel can notify me at that time whether they abandon the appeal.

I am trying to find the subdivision of Rule 73 that applies, but this is a rather unusual form. I have here the amendments, and the prior rule. It is very good when you are doing research, but when you want to do things in a hurry, you cannot find what you want. There is a section which says that before the docketing of the appeal, it can be dismissed, upon the stipulation of the parties, by the District Judge.

I raised the question the other day, when I was asked to dismiss an appeal, and an attorney called my attention to that, that the appeal had not been

docketed, and if it is premature, that it can be dismissed.

So you prepare an order, and I will hold it until April 24th. In that time counsel can communicate with me and tell me whether they want to dismiss the appeal, and file a new one.

Mr. Dennis: Do I understand, your Honor, that if we will not dismiss the appeal, you will sign it, and if we [27] dismiss it, then you will refuse to sign the order?

The Court: That is right. Then I will deny it, and I will clear the decks. When I look at procedure, I am like Judge Mathews, I look at procedural rights as being important, and they are some of the finest rights we have in English-speaking forums. If you study any book on the development of free speech, you will see how long it took to allow juries in criminal libel cases to judge facts on the law, and that was a departure. Free speech could not have been developed in the United States unless juries had been willing to stand up, as they have been urged to do by John Erskine, and others, because before that courts were sending people to jail in that connection.

The rule of procedure is very important, and I was the one who said the appeal was premature, but I don't want this appeal pending. If you stand by the form in which you originally had it, then, of course, a reasonable delay will not matter, and this motion can be renewed. Even if I deny it, it can be renewed if there is further delay in the matter.

Mr. Grover: Could we have the docketing time

extended until that date also, your Honor? It is now due to run out on the fifteenth.

The Court: Yes. We have plenty of time. We have 90 days.

Mr. Grover: I will prepare an order, then, extending [28] the time.

The Court: Yes, do that. You prepare an order, and have it approved as to form, and I will promise you not to sign it unless that contingency arises. If the other appeal is not dismissed, or a new appeal is filed, I am going to enter them.

Mr. Shryock: Then may I inquire, the effect of that will be that the non-finality of the judgment entered on February 25th will then remain?

The Court: But you can renew the motion at any time.

Mr. Shryock: Very well, sir.

The Court: The motion can be made at any time, as to the effect of it. You can renew the motion later if you are not getting anywhere with the negotiations.

Mr. Shryock: The net result, however, would be that even if we do get rid of these so-called precautionary appeals, the judgment would not be a final judgment.

The Court: It will be held up for a reasonable time. I have retained jurisdiction, and I put into the judgment a provision, and you can always use the power of the court to prevent an injustice being done, even to the Government. Of course, it is heretical doctrine these days to say that the Government has rights.

Mr. Shryock: Yes, sir, we are aware of that. I will prepare such an order, your Honor. [29]

The Court: You know, evidently the Court of Appeals has not read some of these fictionalized stories about Fallbrook, because Judge Denman, the Chief Judge, says that this is an action brought by the United States Government as a riparian owner to declare water rights which it acquired through purchase. They have not heard about any claims by a sovereign power. Evidently they have not read the speeches that are being delivered in New York.

Mr. Dennis: Your Honor, I had one other short matter.

The Court: Yes.

Mr. Dennis: Earlier in these proceedings the Government was represented by other counsel.

The Court: Just a minute. The record will show that the matters are under submission; you are to prepare the order, submit it to the clerk, and I will hold it, as I stated.

Mr. Dennis: Earlier in the proceedings the Government was represented by other counsel, and at that time he authorized me to contact various members representing the Secretary of the Navy's office on Camp Pendleton direct, without going through counsel. In view of recent developments, I would like to have the record show whether Commander Shryock would extend to me the same courtesy, so that I can contact them direct in regard to inquiries that I get both from Camp Pendleton and from Washington, D. C. [30]

Mr. Shryock: I can say I have no objection.

The Court: Mr. Agnew has an office there, and I know my secretary has contacted him.

Mr. Dennis: I have no difficulty in reaching him, but in other words, there are many matters that come up in regard to the interests of various clients, and things with which the Commander is not familiar directly.

The Court: You will remember Mr. Agnew was designated as an Assistant Attorney General.

Mr. Dennis: That is correct. But when Mr. Veeder was in the case I was privileged to have any dealings directly with the representatives at Camp Pendleton.

The Court: Well, Veeder was being the whipping boy in the case. I had to make him my own lawyer so as to have somebody appear for me in the Court of Appeals, and now they want to stop his travel allowances. I assume I will have to take up a collection to pay his fare in going to the Court of Appeals to represent me. In connection with that, I can say about the State of California, especially in Los Angeles County, that we have the County Counsel's office, and when I was on the Superior Court, and when that happened there, I just called Sam Pritchard and said, "Come on over. There is a writ against me." So then you did not have to be represented by the attorney for the opposite side. Of, course, there is no such provision in the Federal law, so [31] I had to ask the Attorney General, and if you will look at the record, you will find I asked Mr. McGranery to appear for me.

Mr. Dennis: I understand, your Honor, that Commander Shryock has no objection.

Mr. Shryock: That is correct. They will probably submit it to me, anyway.

The Court: I told you that before we get through here this is going to be a friendly law suit. I think it is developing into that.

Mr. Grover: Your Honor, in the record, or, rather, in Judge Denman's opinion he stated that the State of California had made a motion to transfer the case to Los Angeles. At that time Mr. Shaw was in the case, but I haven't any knowledge that that is so, although it is possible that he did make it without my knowledge.

The Court: All he said was this: When I first intimated that because of conditions down there I might have to move the case up here, and at that time I didn't even have the little hearing room which we now have, and it took me nine months to get it—I made the statement that because of lack of facilities I might have to transfer the case to Los Angeles, where I had a court room available, and then Mr. Shaw said, "I so move." Then Mr. Swing said that he objected to it. He said, "There is no provision [32] for a per diem for me while I am away from home." So we passed it up at the time, but that is what Judge Denman referred to.

Mr. Grover: I see, your Honor.

The Court: He merely said that the State had no objection. As a matter of fact, nothing was done then, and I denied another motion of Mr. Swing to continue it.

So I think Judge Denman's statement of the facts in the case is correct.

All right, gentlemen, I have you all in agreement, and I will keep the matter under submission until April 24th. The case is continued, and that order has already been made. [33]

[Endorsed]: Filed September 21, 1953.

[Endorsed]: No. 14049. United States Court of Appeals for the Ninth Circuit. People of the State of California, Appellant, vs. United States of America, Appellee. Santa Margarita Mutual Water Company, Appellant, vs. United States of America, Appellee. Transcript of Record. Appeals from the United States District Court for the Southern District of California, Southern Division.

Filed: September 22, 1953.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Court of Appeals for the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 14049

PEOPLE OF THE STATE OF CALIFORNIA,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

SANTA MARGARITA MUTUAL WATER
COMPANY, Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

STIPULATION AND MOTION

Whereas several of the opinions and orders of the District Court issued in the above-entitled matter have been published in Federal Supplement;

And Whereas the publishers of Federal Supplement have indicated that reprints of said published opinions and orders will probably be available at a cost of approximately 50c each;

And Whereas said cost is much less than that of including said opinions and orders in the printed record on appeal;

And Whereas all parties to the appeal desire to keep the cost of the appeal at a minimum;

And Whereas it is believed that the use of the aforementioned reprints from Federal Supplement

will adequately serve the needs of both Court and counsel in the course of the appeal——

Now Therefore the Parties to This Appeal Hereby Stipulate that, in the consideration and decision of the appeal, Federal Supplement reprints of the following documents, if available in sufficient quantity, may be used by the Court in place of including said documents in the printed record on appeal, and that said documents need not be printed:

1. Order on pretrial hearing. 109 Fed. Supp. 43. Item 16 of Designation of Record on Appeal.

2. Pretrial order. 109 Fed. Supp. 44. Item 17 of Designation of Record on Appeal.

3. Opinion of December 9, 1952. 109 Fed. Supp. 28. Item 20 of Designation of Record on Appeal.

4. Order of December 9, 1952. 109 Fed. Supp. 42. Item 21 of Designation of Record on Appeal.

5. Findings, conclusions, and judgment. 110 Fed. Supp. 770. Item 22 of Designation of Record on Appeal.

6. Order concerning findings and judgment, dated February 24, 1953. 110 Fed. Supp. 769. Item 23 of Designation of Record on Appeal.

And the Said Parties Hereby Respectfully Move that the court enter an order allowing the use of said Federal Supplement reprints as aforesaid, such order to take effect only if appellants file ten copies of each reprint for the use of the Court.

/s/ By RAYMOND de S. SHRYOCK,

DAVID W. AGNEW,

Attorneys for Appellee, United
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EDMUND G. BROWN,

Attorney General

/s/ By GEORGE G. GROVER,

Deputy Attorney General

Attorneys for Appellant, People of the State of
California

/s/ By W. B. DENNIS,

Attorney for Appellant, Santa Margarita Mutual
Water Company

So Ordered:

/s/ WILLIAM DENMAN,

United States Circuit Judge

[Endorsed]: Filed Nov. 6, 1953. Paul P. O'Brien,
Clerk.

[Title of U. S. Court of Appeals and Cause.]

STIPULATION AND MOTION

Whereas numerous exhibits were admitted into evidence in the trial of the above-entitled matter in the District Court and have been included in the designation of record on this appeal;

And Whereas several of said exhibits are exceptionally large and would be difficult and expensive to reproduce in printed form;

And Whereas all parties to the appeal desire to keep the cost of the appeal at a minimum;

And Whereas it is believed that the needs of the

Court in the course of the appeal can be adequately served by using all the original exhibits on file in place of including them in the printed record on appeal—

Now Therefore the Parties to This Appeal Hereby Stipulate that all the exhibits on file may be used by the Court in the consideration and decision of this appeal as fully as if included in the printed record on appeal, and that said exhibits need not be printed.

And the Said Parties Hereby Respectfully Move that the Court enter an order allowing the use of all the original exhibits as aforesaid in place of including them in the printed record on appeal.

/s/ By RAYMOND de S. SHRYOCK
DAVID W. AGNEW,
Attorneys for Appellee, United
States of America

EDMUND G. BROWN,
Attorney General

/s/ By GEORGE G. GROVER
Deputy Attorney General
Attorneys for Appellant, People of the State of
California

/s/ By W. B. DENNIS,
Attorney for Appellant, Santa Margarita Mutual
Water Company

ORDER ON REPRODUCTION OF EXHIBITS

On consideration of the stipulation of counsel that the original exhibits in above cause may be considered by the court in their original form,

It Is Ordered that counsel for respective parties may furnish four typed copies of exhibits or pertinent portions of exhibits relied on, or in the alternative may print such exhibits or portions of the exhibits as an appendix to their respective briefs.

/s/ WILLIAM DENMAN,

Chief Judge

/s/ WILLIAM HEALY,

/s/ HOMER T. BONE,

Judges of U. S. Court of Appeals

[Endorsed]: Filed Nov. 6, 1953. Paul P. O'Brien,
Clerk.

[Title of U. S. Court of Appeals and Cause.]

DESIGNATION OF PORTIONS OF RECORD TO BE PRINTED

In connection with the above appeals, People of the State of California, Appellant, and Santa Margarita Mutual Water Company, Appellant, herewith present their joint designation of the portion of the record to be printed:

1. Complaint, including Exhibit A thereto.
2. Motion of defendant Santa Margarita Mutual Water Company to dismiss, to strike, and for an order directing plaintiff to file a more definite statement.

3. Order denying motion of defendant Santa Margarita Mutual Water Company to dismiss, to strike, and for an order directing plaintiff to file a more definite statement.

4. Answer of defendant Santa Margarita Mutual Water Company.

5. Motion of People of the State of California to intervene.

6. Order granting motion of People of the State of California to intervene.

7. Answer of People of the State of California, defendant in intervention.

8. Reply of plaintiff United States of America to answer of defendant Santa Margarita Mutual Water Company.

9. Motion of plaintiff for separate trial on the merits against defendant Santa Margarita Mutual Water Company.

10. Order for separate trials as to defendant Santa Margarita Mutual Water Company and defendant Fallbrook Public Utility District.

11. Reply of defendant Santa Margarita Mutual Water Company to plaintiff's motion for separate trial on the merits.

12. Order that People of the State of California, defendant in intervention, be a party to the separate trial as to defendant Santa Margarita Mutual Water Company and defendant Fallbrook Public Utility District (which is lines 4 through 16 of page 305 of the reporter's transcript of proceedings at San Diego, California, on Friday, July 11, 1952).

13. Notice and motion to amend answer of People of the State of California, defendant in intervention.

14. Order that the amendment to the answer of People of the State of California, defendant in intervention, be filed.

15. Amendment to the answer of People of the State of California, defendant in intervention.

16. Reporter's transcript of the proceedings at the trial which was held beginning October 29, 1952, and ending November 28, 1952, as follows:

From page 1, line 1, through page 192, line 21;

From page 199, line 9, through page 215, line 6;

From page 236, line 9, through page 321, line 5;

From page 346, line 19, through page 480, line 10;

From page 505, line 6, through page 751, line 15;

From page 785, line 16, through page 1027, line 16.

17. Portions of proposed amendments of State of California and Santa Margarita Mutual Water Company (lodged February 20, 1953) to proposed findings of fact, conclusions of law, and judgment (lodged by the United States on February 10, 1953) as follows:

Page 1, lines 23 through 28;

Page 2, line 27, through page 4, line 13;

Page 26, line 27, through page 27, line 13;

Page 42, lines 1 through 10;

Page 47, line 1, through page 48, line 8.

18. Notice of hearing to be held July 1, 1953, to determine whether judgment should be made final.

19. Certificate of July 1, 1953, making judgment final.

20. Reporter's transcript of proceedings on April 6, 1953.

21. Notices of appeal of People of the State of California and Santa Margarita Mutual Water Company, filed on July 24, 1953.

22. Order of August 10, 1953, extending time to docket appeals.

23. Statement of points on appeal, filed Aug. 24, 1953, (with notation that an identical statement was filed in the Court of Appeals on Oct. 1, 1953).

24. Stipulation and motion concerning use of Federal Supplement excerpts in lieu of printing of certain portions of the record on appeal (mailed to Court of Appeals November 4, 1953).

25. Stipulation and motion concerning use of exhibits in their original form on appeal (mailed to Court of Appeals November 4, 1953).

26. This designation of the portions of the record to be printed.

EDMUND G. BROWN,

Attorney General

/s/ By GEORGE G. GROVER,

Deputy Attorney General

Attorneys for People of the State of California,
Appellant

/s/ W. B. DENNIS,

Attorney for Santa Margarita Mutual Water Com-
pany, Appellant

Affidavit of Service by Mail attached.

[Endorsed]: Filed Nov. 13, 1953. Paul P. O'Brien,
Clerk.

No. 14049.

IN THE
United States Court of Appeals
FOR THE NINTH CIRCUIT

PEOPLE OF THE STATE OF CALIFORNIA,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

SANTA MARGARITA MUTUAL WATER COMPANY,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Appeals From the United States District Court for the
Southern District of California, Southern Division.

CLOSING BRIEF OF AMICUS CURIAE.

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FILED

NOV 29 1954

PAUL P. O'BRIEN,
CLERK

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No. 14049.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

PEOPLE OF THE STATE OF CALIFORNIA,

Appellant,

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SANTA MARGARITA MUTUAL WATER COMPANY,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Appeals From the United States District Court for the
Southern District of California, Southern Division.

CLOSING BRIEF OF AMICUS CURIAE.

Introduction.

It is our opinion that Appellee's last brief is not so much a reply to *Amicus* as a restatement of its oral argument and a reply to the Brief of Appellants. The part dealing directly with *Amicus*' arguments raises, as to nearly every point discussed in our brief, the technical objection to the consideration of their merits by this Court because error had not been reserved or specified by Appellants. Appellants' Points on Which They Intend to Rely on Appeal are both numerous and comprehensive and cover every phase of the controversy.¹ If, in some instance, a narrow construction of those points would seem to preclude our contentions being formally before the Court, we urge, in view of the thousands of defendants

¹R. 95.

awaiting trial and especially in view of Appellee's own statement that the intended purpose of these separate trials was to "alleviate the burden of the litigation upon the small users," that this Court apply a liberal construction to the specifications of error and ignore technicalities, in order to pass on the merits of the controversy and so avoid as far as possible further appeals to this Court based on misconceptions of the law by either party.

ARGUMENT.

I.

Replying to Appellee's General Arguments.

(a) Surplus "at the Present Time."

At several places in its brief (for example, at pp. 11-15 and 22-23), Appellee has reasserted the thesis, earlier advanced at oral argument, that this appeal is concerned with whether or not there is a surplus "at the present time" available for appropriation and that therefore surplus at some possible future time is of no significance. Taken literally, Appellee's argument would reduce the judgment to an idle declaration regarding a particular moment (a moment that is now in the past so far as this case is concerned). We assume, however, that Appellee's argument concerning the language "at the present time" was designed to limit the scope of the judgment not to a particular moment, but rather to a particular period of years, a period which happens to have been a dry one. This interpretation conflicts with the trial court's own explanation of the decision. In the opinion of December 9, 1952, the Court did not state that there was no surplus at that particular time;² instead the Court reviewed the

²Marine Corps figures showed a waste to the ocean of 49,483 acre feet in the water year 1951-52, the last year covered by the evidence. [Ex. 44, Appx. "B" of Appellant's Op. Br.]

history of the stream and concluded (109 Fed. Supp. at 40-42) that the periodic high flows could not be made available by the physical solution offered by the Santa Margarita Mutual Water Company. The Court was considering the long-range proposal to store the recurring surplus flows; and apparently the conclusion that there was no surplus was intended as a determination applicable to any complete cycle of wet and dry years.

What Appellee is really trying to do is to explain away the patent conflict between (1) the judgment's declaration that there is no surplus and (2) the undisputed evidence of great waste to the ocean of approximately 75% of the total average resources of the River. The true explanation of this conflict is that the trial court rejected the proposed long-time storage as a physical solution. As Appellants have pointed out, the trial court in reality misinterpreted the suggested physical solution. However, the Court was under a duty to consider, on its own initiative, some other possible physical solution (*Rancho Santa Margarita v. Vail*, 11 Cal. 2d 501, 556, 559, 81 P. 2d 533, 561; *City of Lodi v. East Bay Municipal Utility Dist.*, 7 Cal. 2d 316, 341, 60 P. 2d 439, 450), a duty which the Court did not undertake.³

On page 13 of its brief Appellee has presented a table purporting to show that "at the present time" (that is, during the arbitrarily chosen dry period from 1946-47 through 1953-54) the average yield of the stream has been only 7,971 acre feet per year as contrasted with the decreed award to the United States of 11,000, 15,300 or

³Since the trial of this case Congress has made available another physical solution by enacting Public Law 547, approved July 28, 1954, authorizing a dam for the joint use of the Navy and Fallbrook.

69,237 acre feet, whichever you may choose. What Appellee's table refers to as the yield of the stream is actually the waste to the ocean—the amount remaining after all withdrawals by the United States and other users.⁴ The true yield of the stream would be the discharge to the ocean *plus* consumptive uses. Moreover, the table is misleading if used for the purpose of showing the amount of surplus, for the period chosen was a dry one. *Amicus* proposes to take water only when the flow is more than the amount currently being used by those with prior rights. To determine whether or not there is a surplus available for appropriators, therefore, a complete cycle of wet as well as dry years must be considered. Such an analysis reveals beyond question that there is a surplus. As a matter of fact, right in the middle of the dry period covered by Appellee's table, there was a year of very heavy runoff, a year in which an appropriator with adequate storage facilities could have recovered and conserved large quantities of water that wasted to the Pacific. Finally, Appellee's table assumes that Appellee will be able to take the flow up to the maximum of its decreed demand. The trial court itself, however, emphasized the erratic character of the Santa Margarita River, pointing out that the water frequently comes in sudden bursts.⁵ Only by storage can such sudden flows be prevented from rushing unused to the ocean, and Appellee has no storage rights.⁶

⁴The table is obviously based on the records of the Ysidora Gaging Station, brought up to date. Those records show flow to the ocean. [R. 495.]

⁵109 Fed. Supp. 28, 40-41.

⁶Appellee's claim of storage right is only for 4,300 acre feet in Lake O'Neill by prescription, but we assert that that claim has no legal justification.

(b) 11,000 or 15,300?

At pages 15-17, Appellee has once again advanced the claim that the decree grants to it not 11,000 acre feet of water per year but 15,300. Examination of Finding 67 (110 Fed. Supp. at 778-779) shows clearly that the present needed average of 11,000 acre feet therein referred to is the present needed average *at Camp Pendleton*, which obviously includes the agricultural and domestic uses historically made of the water in Lake O'Neill [see Finding 59, 110 Fed. Supp. at 777]. The fact that the *right* to store in Lake O'Neill is "in addition" to the other rights mentioned in paragraph 10 of the judgment does not mean that the water involved in that storage is an additional *use* right over and above the 11,000 acre feet already awarded to meet the Government's present needs. Appellants' Reply Brief (pp. 6-7) completely refutes the claim of Appellee that the planned training and recreational uses of Lake O'Neill have a proper bearing upon the question of surplus, and yet Appellee is content now merely to reassert its claim without discussing Appellants' answer to it.

(c) Flood Benefits.

At pages 17-21 of its brief, Appellee seeks to invoke a right to the flood flows of the Santa Margarita River for the purposes of repelling salt water intrusion into Pendleton Basin, recharging the basin, subirrigating the surface of the basin, and enriching and fertilizing the alluvial plain. Here again, Appellee in reality is attempting to account for the trial court's failure to recognize the surplus that obviously exists. Apparently, Appellee's theory is that what appears to be a tragic waste to the ocean is in reality a justified use of water because of slight benefits to Appellee which incidentally result.

Significantly, this claim in its latest form does not respond to the comprehensive answer to it which appears at pages 13-20 of Appellants' Reply Brief. Appellants there pointed out that these incidental benefits resulting from waste flows were not at all the theory upon which the trial court based its judgment—no award was made for any of them. Moreover, the trial court made no quantitative comparison of the amount of these incidental benefits in relation to the amount of waste; as Appellants correctly observed, the trial court could not determine the reasonableness of these uses without first determining the amount of water thereby consumed. We emphatically dispute Appellee's incredible assertion (p. 20) that the California cases "reveal" that the "sole criterion" in regard to flood water is whether the flood waters "benefit the land." On the contrary, at the heart of the present water law of California is the concept that waste must be avoided; the very decision upon which Appellee purports to rely (*Peabody v. City of Vallejo*, 2 Cal. 2d 351, 376, 40 P. 2d 486, 495) makes it clear that all uses must be reasonable as well as beneficial and that a riparian owner may not insist upon a large waste in order to obtain a small benefit. (See also *Town of Antioch v. Williams Irr. Dist.*, 188 Cal. 451, 461, 205 Pac. 688, 693.)

(d) The Water Available at Camp Pendleton.

At pages 24-26, Appellee reviews several factors bearing on the supply of water at Camp Pendleton. (1) The amount which is available at Camp Pendleton *for use under the Government's lawful rights* is not 12,500 acre feet. The trial court's finding that this amount is available to the Government is based on the acknowledged fact that the Government will have to construct and

operate a proposed “equalizing” reservoir to attain that figure—but the Government may not lawfully do so, as is pointed out later in this brief. (2) The Navy is to be complimented on its conservation practices, including use of sewage effluent. But the fact that the Navy’s rights do not entitle it to all the water it would like to have does not give the Navy any greater rights. Necessity is not the measure of one’s rights. In view of the prohibitions upon artificial storage by Appellee, as a riparian, there certainly exists a surplus over Appellee’s rights even in the absence of any surplus over Appellee’s needs. (3) Finding 18, which states that considerable agricultural land at Camp Pendleton is not irrigated because of insufficiency of water, merely reflects legal limitations upon the Government’s riparian rights—the United States may not, under riparian claim, store water or use water on nonriparian land. Appropriators, not being subject to such limitations, are often able to make lawful use of water resources which are not available to riparian owners. That is the situation in this case. (4) True, some of the 28,000 acre feet average waste to the ocean will be stored in the Vail Reservoir under appropriative rights which are prior to those of the Santa Margarita Mutual Water Company or the Fallbrook Public Utility District. However, the record since Vail Reservoir was built shows that much water can still be obtained by further storage. For example, in the water year 1951-1952, there was a discharge to the ocean of 49,483 acre-feet.⁷ This, and the losses of other years, must be conserved in this semi-arid region where water is its treasure.

⁷Plaintiff’s Exhibit 44; Appellants’ Opening Brief, Appendix “B”.

II.

Replying to Appellee's Charge That Numerous Inaccuracies Are Presented to the Court by Amicus.

(a) Regarding Appellee's Right to Impound Water.

We are glad to have Appellee state to this Court "The United States of America claims no right to impound riparian water."⁸ We hope that this Court will include such a pronouncement in its decision.

The trial court, faced with Plaintiff's testimony that it could not secure from the river or its underground basins the amount of water for which it was asking an award without a dam to impound flood waters and so artificially augment the available supply,⁹ did sanction the Government's plan for storing flood waters "temporarily" in a surface reservoir and thereafter transferring same to its underground reservoir basins for future use. Appellee may be technically correct in saying the Decree does not expressly award a right to the United States to store riparian water but the decree of necessity contemplates the use of a so-called equalizing reservoir at the De Luz site without which the trial court found¹⁰ the quantities of water awarded to the Government could not possibly be secured from the river, all as we pointed out in our *Amicus Curiae* brief.

While the decree does not so state, Appellee claimed in the Court below that this "impounding" is to be done under a claim of riparian right.¹¹ As we pointed out in our first brief, this is an ingenious device to store water for future use by dividing the process into two stages,

⁸Page 27, Appellee's Reply Brief to *Amicus*.

⁹See discussion of dam, in *Amicus Curiae* Brief, pages 43-48.

¹⁰109 Fed. Supp. 28, 41.

¹¹R. 480-481, 506-507, 622-623.

the first in a surface reservoir, the second in an underground reservoir. This is without legal justification. Of course, the Navy can acquire a storage right by completing its Application No. 12576 to appropriate and store the waters of the River now pending before the State Division of Water Resources.

Even if the proposed plan were to be considered a water-spreading project, it still would be outside its riparian rights and under California law would constitute the exercise of an appropriative right. California Water Code, Division 2, Part 2, under the heading "Appropriation of Water" Section 1242 provides:

"The storing of water underground, including the diversion of streams and the flowing of water on lands necessary to the accomplishment of such storage, constitutes a beneficial use of water if the water so stored is thereafter applied to the beneficial purposes for which the appropriation for storage was made."

The rules of the Division provide for the making of an application for such projects as is proposed by the Government.

It makes no difference that the storage in the Government's proposed surface reservoir may be for only short periods of time and may not technically amount to seasonal storage. In *Moore v. California Oregon Power Co.*, 22 Cal. 2d 725, 140 P. 2d 798, cited in Appellants' Opening Brief, the California Supreme Court refused to recognize a riparian right to store water for periods as short as a day or even less than a day. The Court declared that the principle applicable to the prohibition against seasonal storage by riparians is equally applicable to short-term storage. (22 Cal. 2d at 735, 140 P. 2d at 804.)

Since the proposed dam for the impounding of flood waters cannot come within any possible prescriptive claim and since Appellee now disclaims any appropriative right for this particular purpose,¹² we respectfully request this Court to declare that no right to impound water is now inherent in the United States as the owner of Rancho Santa Margarita.

(b) Regarding Appellee's Right to Use Riparian Water on Non-riparian Land for Military Purposes.

The trial court found and concluded that:

"The past and present diversion of water by the United States of America from the Santa Margarita River, as disclosed in the preceding findings, has been a reasonable exercise under the laws of the State of California *of its riparian rights*."¹³ (Emphasis added.)

The "preceding findings" referred to above include Finding 66, which is:

"In addition to the water distributed for agricultural (irrigation) purposes on Stuart Mesa and South Coast Mesa outside of the watershed, practically all of the water delivered for military use by the distribution system is delivered outside of the watershed, including Areas 11, 12, 13, 14, 15, 16 and 17, as well as Camp Del Mar."¹⁴

Therefore when the Judgment in paragraph 10 awarded to Appellee, as its present water need, 11,000 acre feet per year, and for its future needs 23,500 acre feet per year, and in paragraph 16 decreed that the United States' "rights to the use of water hereinabove described" be

¹²Appellee's Reply to *Amicus*, pages 27, 43-44.

¹³110 Fed. Supp. 767, 786, No. 19 Conclusions of Law.

¹⁴110 Fed. Supp. 767, 778, Finding No. 66.

quieted against the Appellants “and all parties claiming under them,” the trial court, contrary to the assertion of Appellee at page 27 of its Brief, did decree that *the United States for military purposes could use its riparian water on non-riparian land* as it had theretofore been doing.

However, we gladly accept Appellee’s declaration that “the United States of America does not claim a right to use riparian water on nonriparian land” and respectfully request that the disavowal be made official and binding by this Court including an appropriate declaration to that effect in its decision.

(c) Regarding Appellee’s Defense of That Portion of the Judgment Which Declares That Military Use Is a Riparian Use and Exercised to the Extent Necessary in Substitution of the Agricultural Use.¹⁵

In reply to our criticism of the “Substitute Use” theory adopted by the trial court¹⁶ holding that the Government was entitled to use for military purposes “the maximum agricultural use to which the United States would be entitled under its riparian rights” if its riparian lands were used for agriculture (quoting from the actual provisions of the Judgment entered herein February 25, 1953¹⁷), Appellee attempts to answer this criticism merely by quoting from the prior decision of the trial court announcing its determination and directing preparation of Findings and Judgment in accordance therewith.¹⁸ Appellee then declares “the decision of the Trial Court is in full conformity with California law.” Appellee seems

¹⁵Appellee’s Reply Brief to *Amicus*, page 28.

¹⁶See *Amicus* Brief, pages 7-10.

¹⁷110 Fed. Supp. 767, 787, 788.

¹⁸109 Fed. Supp. 28, 37.

to think the truth of its assertion is self evident since it cites no authority. We are uncertain what point is attempted to be made. It appears to conflict with its prior disclaimer that the United States does not claim a right to use riparian water on non-riparian land, since its military uses admittedly are practically all on non-riparian land.¹⁹

(d) Regarding United States Rights to the Use of Water for Military Purposes.

This appears to be a continuation of (c) and in the same general vein. The Government was awarded very large quantities of Santa Margarita River water for military purposes. As we have seen, most of the military uses are outside the watershed and on non-riparian lands. Appellee first makes the technical objection that no appeal was taken on this point. However, there is ample basis to be found in paragraphs 3, 4, and 5 of the "Statement of Points on which Appellants intend to Rely on Appeal"²⁰ to justify our pointing out this error. Appellee then erroneously declares that "'reasonableness' is the *sole* criterion in regard to the use of riparian water"²¹ (Emphasis added) but fails to cite any authority for its statement. The truth is that "reasonableness" is only *one* of the criteria. Since the adoption of the 1928 Constitutional amendment "reasonable use" like "beneficial use" is a measuring stick for riparian rights as well as *all* other rights to the use of water in California. It does not follow, however, that the converse is true and that all reasonable beneficial uses are riparian uses. All stallions may be horses but all horses are not stallions.

¹⁹Appellee's Brief, page 25; Finding 66, 110 Fed. Supp. 767, 778.

²⁰R. 96.

²¹Appellee's Reply to *Amicus* Brief, page 29.

Appellee either mistakes or misstates Amicus' position when it says we challenge the right of the United States to use water for agricultural purposes. What we pointed out in our brief²² was that the judge's adoption of the "Substitute use" theory (*i. e.*, allowing the United States to use the same quantity of water for military purposes as it might have used for agricultural purposes) *has no basis in fact* since the United States has never discontinued any of the uses of water for agricultural and livestock purposes or pretended to transfer such uses to military purposes. It is undisputed that the agricultural uses have continued as before and the heavy military uses added as a new burden imposed on the river; also that the water for military uses is principally on lands outside the watershed. Appellee's reply doesn't pretend to answer this serious objection.

(e) Regarding the Incorrect Statement That California Law Does Not Contemplate the Filing of an Application to Appropriate Water for Military Purposes.

While it is true that applications to appropriate water for military purposes are not usual or common, because military camps are not numerous, it is not true that the laws of California do not authorize the receiving and processing of applications covering uses practiced at military establishments. The complete answer to such suggestion is that the State Division of Water Resources has already done so in this very case, having received and filed on June 30, 1948, the application of the Navy to appropriate 165,000 acre feet of water per annum from the Santa Margarita River for use at Camp Pendleton, all as shown by Defendant's Exhibit "K" admitted in evidence in this case.

²²*Amicus Curiae* Brief, pages 7-10.

Appellee next goes outside the record to speculate on how other military establishments in California get their water and suggests “that it is not the policy of the State of California to attempt to deprive them of that water.”²³ First, let it be noted that the State of California is not and has not attempted to deprive Camp Pendleton of water but has been and now is willing to cooperate and help it get its water in a legal manner and in accordance with the laws of the State. Secondly, Appellee could have told the Court, without any speculation whatever, that at certain other military establishments in California such as El Toro Air Base in Orange County and at March Field in Riverside County, it is not the policy of the Federal agencies there to attempt to deprive the local people of their local supply but instead they have contracted with the Metropolitan Water District to supply their requirements with Colorado River water. Also that the Navy has had before it for some time an offer from the Metropolitan Water District for similar service of supplying Camp Pendleton with Colorado River water, which offer is still open to acceptance.

Appellee again asserts that it makes “no claim that it may utilize riparian water on nonriparian land” and adds: “The Court . . . does not award to the United States any such right.”²⁴

We insist that the judgment does just exactly what the Appellee here disclaims and for that reason the Appellee eagerly wants it affirmed as is. We fear Appellee wants a wide no man’s land or a twilight zone in which it can maneuver to later take advantage of every vague expression and uncertain word found in it.

²³Appellee’s Reply Brief to *Amicus*, page 31.

²⁴Appellee’s Reply Brief to *Amicus*, page 31.

Therefore if Appellee means to be bound by the full import of its words it should join us in respectfully requesting this Court to spell out Appellee's disclaimer in its decision with such particularity that no uncertainty or controversy over what the United States claims and what its rights are can hereafter ever arise.

(f) Regarding Appellee's Claim of Prescriptive Rights.

Appellee is a self accuser in imputing to us the accusation that "in some manner the United States of America seeks to mislead this Court."²⁵ Counsel cannot be easy in mind while continuing to urge upon this Court the *Larsen* case as supporting their claim of prescriptive rights. It is untrue that *Amicus'* and Appellants' only answer to the *Larsen* case was "that it is contrary to the general rule adhered to in that State." What Appellants did say was "*Appellee's interpretation of Larsen v. Apollonio*, 5 Cal. 2d 440, 55 P. 2d 196 (1936) . . . would throw that decision out of line with numerous other decisions of the California courts," and that "*Dykseul v. Mansur*, 65 Cal. App. 2d 503, 150 P. 2d 958 (1944), which appellee also cites as support for its theory . . . clearly involved a diversion and trespass upon land belonging to another person, just as the *Larsen Case* did."²⁶ (Emphasis added.)

At pages 48-53 of their opening brief, Appellants had called Appellee's attention to the undisputed facts on which the *Larsen* decision was based, which were that plaintiff's diversion had originally been made on a large tract of land owned by defendant's predecessor of which defendant's land was then a part. The diversion therefore

²⁵Appellee's Reply Brief to *Amicus*, page 32.

²⁶Appellants' Reply Brief, pages 29-30.

constituted an actual invasion of defendant's predecessor's rights which, having been persisted in for the statutory period without legal action or objection, gave plaintiff a prescriptive right. Appellants then closed their discussion with the declaration, "We respectfully submit that the *Larsen* case is not in conflict with the cases on which we rely."²⁷ Appellee had ample time to verify the facts in the *Larsen* case from the record in that case, and we insist that it was its duty to have done so.

(g) Regarding the Stipulated Judgment Between the Vails and the Predecessor of the United States.

Appellee here seeks unjustifiably to invoke the technicality that no appeal was taken from the Court's declaration in regard to the Stipulated Judgment between the United States and the Vails. Ample basis is to be found in paragraphs 15 and 17 of the "Statement of Points on which Appellants intend to Rely on Appeal"²⁸ to justify our complaining of and presenting arguments at pages 29-32 of *Amicus* Brief against the use of this Stipulated Judgment in the separate trials of Appellants, who were not parties thereto. Nowhere either in its Reply Brief to Appellants or its Reply Brief to *Amicus* does Appellee give any reason or cite any authority warranting the injection of the Stipulated Judgment into the trials in the Court below. Finally in its Reply to *Amicus*, Appellee abandons any claim to any "[1] . . . right to utilize riparian water on nonriparian land as provided by the Stipulated Judgment; [2] claims no right to store riparian water."²⁹ However, Appellee does continue to claim "the three (3) cubic feet per second which the Vail Estate

²⁷Appellants' Opening Brief, page 53.

²⁸R. 99.

²⁹Appellee's Reply Brief to *Amicus Curiae*, page 35.

delivers to the United States of America pursuant to the Stipulated Judgment.”³⁰ We pass over, for the purposes of this argument, the incorrect statement that the three cubic feet per second are delivered “*to the United States of America*” when the Stipulated Judgment merely provides that the Vails shall “cause to be maintained at Gaging Station No. Three (3) a constant flow of water of not less than three (3) cubic feet per second.”³¹ However, it seems to us that if for any reason the attempted grant by the Vails to the owners of Rancho Santa Margarita of rights of storage and use of water on non-riparian lands was not effective as against Appellants, as Appellee now concedes, *for the very same reason* the third claimed benefit under the Stipulated Judgment of “a constant flow of water of not less than three (3) cubic feet per second” would also be ineffective. Appellee cites no authority and offers no explanation how this anomaly can be. We know of none.

(h) Regarding the United States-California Stipulation.

We contended in the *Amicus* brief that the Stipulation contained enough uncertainties to justify this Court passing on its true meaning and we asked that it be given the same interpretation put on it by the officials who wrote it in statements made by them (just before and just after its execution) in their testimony before Congressional Committees and when presenting their view through the medium of the Congressional Record.³² Appellee complains that the quotations used by us were “stripped from con-

³⁰Appellee’s Reply Brief to *Amicus Curiae*, page 35.

³¹R. page 29. Note: Gaging Station No. 3 is 6 or 7 miles upstream from Rancho Santa Margarita, with numerous intervening land owners. [See R. 22.]

³²*Amicus* Brief, pages 32-43.

text” but it suggests no additional language used at the time which would in any way modify or change the meaning of the clear-cut statements quoted in our Brief.

It is not true that the “single question” before the Congressional hearing concerned the term “paramount.” In most instances, as the quotations printed in the *Amicus* Brief³³ clearly show, the questions and answers also embraced declarations that California State water laws should measure and limit the rights of the United States and that the Federal Government would claim no water by reason of its sovereignty, *i. e.*, “the powers of the National Government under its Constitution,”³⁴ but only as a landowner. We, of course, realize that no mere functionary of the Government can give away its property or property rights but since the attorneys quoted were the same ones who drafted the Plaintiff’s complaint and were in charge of its prosecution, we assumed they had a right to and could interpret its language and define the issues of that cause of action. However, we believe that it is now settled, Stipulation or no Stipulation, that State laws control and regulate *the use of water* on non-navigable streams within the boundaries of each State. Furthermore, we are satisfied that under the facts of this case and under the laws of California the United States cannot claim a prescriptive right either for storage or for use out of the watershed. Neither is there anything in Appellee’s brief or in the record to exempt the United States

³³*Amicus* Brief, pages 36-42.

³⁴This is the claim made by Appellee at page 87 of its Reply Brief to Appellants which prompted our accusation, especially as it was followed on the same page with the further statement: “The state law would have no bearing upon the activities of the United States of America within the area and over the rights to the use of water which are here involved.”

from complying with the California water laws governing the making of appropriations, since the testimony regarding diversions and use out of the watershed relates solely to acts and happenings occurring after the 1913 Water Commission law went into effect.³⁵ Anyway the United States, acting through the Navy, has already submitted itself to the State laws governing appropriations by filing on June 30, 1948, its Application No. 12576 to appropriate 165,000 acre feet of water per annum of the Santa Margarita River,³⁶ and has waived any claim which it might have had that these State laws do not apply to the Federal Government.

(i) Regarding Judgment Conflicting or Interfering With the Proper Functions of the State of California.

Appellee recites a single sentence out of context from Paragraph 15 of the judgment and ends its discussion of that particular feature of the judgment by saying: "There is thus disclosed that in actual practice this litigation [meaning the judgment] has not interfered with the State proceeding to perform its functions."³⁷

Appellee omitted the pertinent part of the paragraph of the judgment from which it quoted, which says: ". . . injunction against further prosecution of the application [of the Santa Margarita Mutual Water Company] is not necessary. A declaration of right will suffice."³⁸ Furthermore, the paragraph immediately follow-

³⁵See Appellants' Reply Brief, pages 30 *et seq.*, and *Amicus Curiae* Brief, pages 25-26.

³⁶Defendant's Exhibit "K".

³⁷Appellee's Reply to *Amicus*, page 40.

³⁸110 Fed. Supp. 767, 788, Paragraph 15 of Judgment.

ing imposes a blanket injunction on the State of California as follows:

“It is further ordered, adjudged and decreed that the rights, title, and interest of the United States in and to the rights to the use of water hereinabove described are quieted as against the adverse claims of the defendant Santa Margarita Mutual Water Company and the Defendant in Intervention the State of California, and all parties claiming under them; and *they and each of them are forever barred from any and all claim of right, title or interest in and to those rights to the use of water.*”³⁹

Certainly the State of California, faced with the foregoing, is unlikely to act upon or issue any further permits on the Santa Margarita River. The judgment constitutes a moral barrier if not a legal one.

(j) Regarding “Average Annual Flow.”

Under the above heading Appellee berates us for failing to appreciate the award the trial court made to the United States as its riparian rights in the River by the Judgment entered herein. Appellee proudly declares: “Those rights were decreed by the Court to be in the aggregate of 69,237 acre-feet per year.” Admittedly the total normal annual water crop of the entire river is only around 36,000 acre feet. It seems truly remarkable therefore that Appellee claims under the award twice the average flow or 69,237 acre feet—and that amount for just *one* riparian owner. But, this 69,237 acre feet per year, so Appellee says, was awarded to it as its *riparian rights* only. To that figure must be added, if we accept Appel-

³⁹110 Fed. Supp. 767, 788, Paragraph 16 of Judgment.

lee's contentions elsewhere in its brief, its *prescriptive rights*, which the trial court found were "4,806 acre-feet used on irrigated lands outside the watershed which *the United States has acquired the right to use by prescription.*" And the trial court also has found: "In addition *the United States of America has acquired by prescription* the right to divert and impound annually in Lake O'Neill 4,300 acre-feet of water."⁴⁰ (Emphasis added.)

Only a "mathematical mirage," to use an expression coined by Appellee, could produce such fantastic results. We think such unrealistic findings were the logical result of the unnatural procedure adopted in this case of trying piecemeal and separately the claims of individual defendants where a comprehensive adjudication of the water rights of the entire watershed was called for by the pleadings.

Again Appellee seeks to avoid a decision on the merits of *Amicus'* arguments by claiming that technically Appellants did not reserve errors. The principal contention of *Amicus* at pages 43-48 of its brief was that the trial court sanctioned the "equalizing" or averaging of the flow of the River by storage and thus artificially increased the amount of water the United States could divert under its riparian right. We believe that paragraph 7 of Appellants' Statement of Points on Appeal,⁴¹ reasonably interpreted, justifies *Amicus* presenting the objections and arguments it did.

⁴⁰110 Fed. Supp. 767, 788, Paragraph 10 of Judgment.

⁴¹R. 97.

(k) Regarding 27,983 Acre Feet of Water Which Has Annually Wasted Into the Ocean, Being 75% of the Total Average Resources of the River.

Appellee's answer to this immense wastage of precious water is that the trial court found there was no surplus, but this Court is not bound by such a finding in the face of the undisputed evidence supplied by the Government's own witnesses. The claim of Appellee to practically all the water in the river is based on a claimed need to:

- (1) recharge the subterranean basin.
- (2) repel salt water intrusion.
- (3) maintain the level in the basin to subirrigate wild grass.

The wastage of 75% of the total resources of a river to accomplish the foregoing results is contrary to the public policy of the State of California unless absolutely necessary to protect the rights of the riparian owner. As was pointed out in the Brief of *Amicus*, pages 48-56, the salt water intrusion in 2 wells near the ocean was the result of appellee's excessive pumping and exportation out of the watershed, there being at all times a source of water available to the appellee in the two upper basins, which have a combined capacity of approximately 40,000 acre feet.⁴² The claim of need for maintaining high water tables sufficient to subirrigate wild grass would forbid the reasonable use of the basins since any substantial pumping therefrom would lower the water table in ordinary years below the roots of wild grass. Appellee's own witnesses named 100 feet below the ground surface as a depth to which the middle and upper basins could be reasonably

⁴²R. 290-291, 315-316.

and safely drawn down. The Government's own records show that the water table in these 2 basins has never been lowered to even one-fifth ($1/5$) that depth during the period of claimed critical water shortage. Plaintiff's Exhibit 11 shows the water level profile in October, 1951, after two of the driest years of record with no water reaching the ocean; in the middle or Chappo Basin the water level was less than 25 feet below the ground level while in the upper or O'Neill Basin the water level was less than 15 feet.

(1) Regarding Existence of Surplus Water in Santa Margarita River Available for Appropriation.

Appellee complains that the Navy's application to the State to appropriate 165,000 acre feet of water filed June 30, 1948, is not before the Court. It is before the Court *as evidence* in the case, being Defendant's Exhibit "K." Of course no appeal was taken from it because itself it was not an issue. Of course no one objects to the Navy making its application. In fact we think the Navy did just what it should have done. But Appellee is now here saying that the Navy had these appropriative rights all the time, under a claim of "*de facto*" or "non-statutory" appropriation. We ask this Court to note the fact that the Navy in making this application showed that it did not think it had appropriative rights in 1948 as we have pointed out in our Brief at pages 25-28. This is not a case of an appropriation made on public lands or one made on private lands prior to the time the public domain upstream passed into private ownership. Under those circumstances the cases hold that a subsequent entryman took his patent and title encumbered with the diversions and water uses theretofore established. There has been no reason presented to this Court why the California Water

Commission Act of 1913 should not be applicable to the Government's claim of appropriation in view of the facts in this case and the written stipulation between the United States and California that the State laws should measure the rights of the United States of America to the use of water.

(m) Regarding Burden of Proof, Judge Views the Premises and Threat to Military Establishments if Decision Is Adverse to the United States.

Amicus has already explained its views on the above subjects which it is not necessary to repeat here.

Appellee has injected considerable confusion in its discussion by constantly asserting that there is an insufficient supply in the River to meet the riparian demands, therefore there cannot exist any surplus subject to appropriation.

We believe it important to point out that there well may be an admitted shortage in the "normal" flow of the River to meet the riparian requirements and yet exist a surplus in the River available for appropriation. This frequently occurs because riparians may not store water in the season of heavy rain and runoff for use in the dry season of no runoff. A deficiency in the supply available to riparians occurs nearly every year on streams of intermittent flow. In the season of heavy winter rains when the runoff exists, the farmer has few crops to irrigate and the requirements of those he has are largely met by the same rains that produce the runoff in the stream channel. In the late Spring and Summer when crops need to be irrigated the runoff has ceased and riparians are faced with a seasonal shortage. The runoff of the winter rains which the riparian farmer has

little need for at that season of the year and which he may not store under a riparian right, thereby become the surplus which the appropriator may store for future use to avoid it wasting into the ocean. And that is what has frequently happened on the Santa Margarita River according to the records in this case.

Therefore Appellee's frequent reference in its brief to the "meager supply of water in the Santa Margarita River inadequate to meet the riparian demands," did not refer to or include in that description of the riparian's water supply the great floods listed in the judge's decision, most of which reached the ocean unused. We listed some of these flashfloods in our brief at page 44.⁴³

Regarding *Allen v. California Water and Telephone Company*, Cited by Appellee.

It is true that in the case of *Allen v. California Water and Telephone Company*, 29 Cal. 2d 466, 176 P. 2d 8 (1946), relied on by Appellee and cited at pages 19 and 45 of its Brief, there existed a threat of salt water intrusion to an underground basin as there does in this case, but the California Supreme Court in the *Allen* case did not allow the riparians to claim the surface flow of the river for the purpose of forcing a small part of the water into the underground basin to maintain a fresh water barrier and the rest to waste into the ocean. On the contrary, it adopted a physical solution to prevent the waste of so much precious water and provided that the appropriator could take and divert upstream the equivalent amount of water which would otherwise waste into the sea. The California Supreme Court added language

⁴³For a fuller list, see trial Judge's decision reported in 109 Fed. Supp. 28, 40-41.

of its own to the decree of the lower court and as modified affirmed the judgment. Paragraph VII A, which was added to the decree in that case, was as follows:

“Defendant and cross-complainant, California Water & Telephone Company may operate its pumping plants and pump water from its wells on its land in the Tia Juana Valley and export that water for use by its customers when surface river waters are flowing in the bed of the Tia Juana River and which surface waters, if not intercepted by such pumping operations, would waste into the ocean.”⁴⁴

That is substantially what we are urging should be done in this case. Here 75% of the water resources of the river have, on the average, been lost into the ocean in a semi-arid region crying for this very water. In the language of the *Allen* case we ask that Fallbrook Public Utility District, the appropriator, be allowed to divert for storage and use by Fallbrook residents when surface river waters are flowing in the bed of the river and which surface waters if not intercepted by such storage and diversion would waste into the ocean.

Conclusion.

In conclusion it must be said that as a result of Appellee's latest Brief in Reply to our brief, the widespread gap between the original contentions of the respective parties has been substantially narrowed and the number of issues greatly reduced. This action started with the Government advancing every possible legal justification in support of its then and past uses and practices, claiming the greatest possible amount of water and the great-

⁴⁴*Allen v. California Water & Telephone Co.*, 29 Cal. 2d 466, 491, 176 P. 2d 8, 23.

est freedom of action as to the area in which it might use the water. We congratulate Appellee in abandoning some of its less tenable contentions.

1. As we read its Brief in Reply to *Amicus*, Appellee no longer claims⁴⁵ as valid that portion of the decision which declares:

“The past and present diversion of water by the United States of America from the Santa Margarita River, as disclosed in the preceding findings, has been a reasonable exercise under the laws of the State of California of its *riparian rights*.”⁴⁶ (Emphasis added.)

It having already been conceded by Appellee, and found by the trial court, that “practically all of the water pumped for military purposes is delivered outside of the watershed,”⁴⁷ Appellee’s disavowal that the United States claims any right to use riparian water on non-riparian land leaves the above quoted portion of the decision confessedly without support.

2. As we read Appellee’s latest Brief, it disavows any claim of any right, (1) to store water; or (2) to use water outside of the watershed *by virtue of the Vail Stipulated Judgment*⁴⁸ although at page 19 of its first Brief it had listed among its claimed benefits:

“c. Rights to Use Water Under the Stipulated Judgment Outside of the Watershed; Right to impound.”

⁴⁵Appellee’s Reply to Brief of *Amicus*, pages 27 and 31.

⁴⁶Conclusion of Law No. 19, 110 Fed. Supp. 767, 786.

⁴⁷Appellee’s Brief, page 25; see Trial Court’s Finding No. 66, 110 Fed. Supp. 767, 778.

⁴⁸Appellee’s Reply to Brief of *Amicus*, page 35.

We appreciate Appellee's present disclaimer of any of those rights under the Stipulated Judgment as an aid to the clarification of the issues. However, we believe it will be necessary for this Court to indicate proper qualifications and limitations on No. 23 of the Conclusions of Law which declares:

“Each and every right to the use of water of the United States of America in the Santa Margarita River, *including* but not limited to *the rights contained in the Stipulated Judgment*, Exhibit A of the Complaint, are prior and paramount to the rights claimed in that stream by the Santa Margarita Mutual Water Company.”⁴⁹ (Emphasis added.)

Since it is now conceded that the Stipulated Judgment binds only the parties thereto and their privies, the attempt to vest the Government with the rights specified in the Stipulated Judgment as against defendants who were not parties thereto, can be of no force or effect. However, Appellee continues to claim as valid one portion which provides for a continuous flow in the River of three cubic feet per second. It cites no authority for validating one inseparable provision from the rest of the judgment. We know of none.

3. Appellee still claims prescriptive rights to store water in Lake O'Neill (4,300 acre feet) and to divert water out of the watershed for use on the Stuart and South Coast Mesas. We are confident, however, that both the facts and the law are against such claim.

4. Appellee appears to be still claiming a “non-statutory” appropriation, but all the evidence in the case shows that the diversions and uses were after the adop-

⁴⁹110 Fed. Supp. 767, 787.

tion by the State of its Water Commission Act in 1913 requiring all appropriations to be initiated by the filing of a written application with the proper State official. The Stipulation between the United States and the State of California specifies that State law should govern and the case was tried by all parties on that basis. We think even without the Stipulation, State law controls in these matters.

It follows from the foregoing that the Judgment must be reversed.

November 26, 1954.

Respectfully submitted,

SWING, SCHARNIKOW & STANIFORTH,

By PHIL D. SWING,

*Attorneys for Fallbrook Public Utility District,
Amicus Curiae.*

No. 14100. ✓

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

COMMISSIONER OF INTERNAL REVENUE,

Petitioner,

vs.

WILSHIRE HOLDING CORPORATION,

Respondent.

Petition for Rehearing by Respondent and Request
for Hearing En Banc.

MURRAY M. CHOTINER,

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202 South Hamilton Drive,
Beverly Hills, California,

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FILED

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PAUL P. O'BRIEN, Clerk

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No. 14100.

IN THE

United States Court of Appeals

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COMMISSIONER OF INTERNAL REVENUE,

Petitioner,

vs.

WILSHIRE HOLDING CORPORATION,

Respondent.

Petition for Rehearing by Respondent and Request
for Hearing En Banc.

Statement of Case.

Your petitioner, Wilshire Holding Corporation, is the respondent in the above entitled action.

Heretofore the Tax Court of the United States in the case of *Walburga Oesterreich v. Commissioner of Internal Revenue* ruled in favor of the Commissioner of Internal Revenue, and in the companion case of *Wilshire Holding Corporation v. Commissioner of Internal Revenue* ruled in favor of Wilshire Holding Corporation.

That thereafter *Walburga Oesterreich* appealed the decision of the Tax Court to the above entitled Court in the case of *Walburga Oesterreich v. Commissioner of Internal Revenue*, No. 13924; and the Commissioner of Internal Revenue took a protective appeal in the case of *Commissioner of Internal Revenue v. Wilshire Holding Corporation*, No. 14100.

Pursuant to a stipulation of the parties, proceedings on appeal in the above entitled case No. 14100 were held in abeyance pending the decision of the Court in the *Oesterreich* case, No. 13924.

Wilshire Holding Corporation was permitted to file a brief *amicus curiae* in the *Oesterreich* case and was permitted to argue at the time of oral argument in the *Oesterreich* case.

The above entitled Court reversed the Tax Court in the *Oesterreich* case on October 29, 1955.

Wilshire Holding Corporation on November 6, 1955 asked the Attorney General to file a petition for rehearing in the *Oesterreich* case and on November 10, 1955 the Attorney General informed your petitioner that it would not do so.

That thereupon, on November 23, 1955, Wilshire Holding Corporation petitioned the above entitled Court for an order permitting it to file a petition for rehearing in the *Oesterreich* case as *amicus curiae*, and submitted the proposed petition therewith.

That the above entitled Court on June 6, 1956 denied the said petition of Wilshire Holding Corporation to file a petition for rehearing as *amicus curiae* in the *Oesterreich* case.

That the Commissioner of Internal Revenue after the decision in the *Oesterreich* case made a motion that the decision of the Tax Court in the above entitled case be summarily reversed on the basis of the Court's opinion in the *Oesterreich* case.

Wilshire Holding Corporation filed its written objections to the motion to reverse and thereafter, without

a hearing or affording an opportunity to Wilshire Holding Corporation to submit oral argument, the above entitled Court on December 6, 1956 made an order granting the motion to summarily reverse the Tax Court in the above entitled action.

Grounds for Rehearing.

A rehearing should be granted herein and the decision vacated for

I.

THE DECISION WAS RENDERED CONTRARY TO THE COURT'S RULES.

II.

THE DECISION IS CONTRARY TO LAW.

A. WHERE THERE IS A LEASE WITH A RIGHT TO PURCHASE, THE RENTAL PAYMENTS ARE NOT CONSIDERED AS PURCHASE PRICE PAYMENTS UNTIL THE PURCHASE RIGHT IS EXERCISED OR EXERCISABLE, OR UNTIL IT MAY BE PREDICTED WITH CERTAINTY THAT THE RIGHT WILL BE EXERCISED.

B. A REVIEW IS LIMITED TO QUESTIONS OF LAW.

III.

THE DECISION IS CONTRARY TO THE EVIDENCE.

A. THE REAL INTENT OF THE PARTIES WAS TO EFFECT A LEASE RATHER THAN A SALE.

B. THERE WAS A VALUABLE CONSIDERATION FOR THE FUTURE TRANSFER OF TITLE OTHER THAN THE MONTHLY PAYMENTS.

C. WILSHIRE HOLDING CORPORATION HAS NOT ACQUIRED AN EQUITY IN THE PROPERTY.

D. THE PAYMENTS BY WILSHIRE HOLDING CORPORATION ARE COMMENSURATE WITH THE BENEFITS DERIVED BY IT.

ARGUMENT

POINTS AND AUTHORITIES.

(Unless otherwise stated, reference to pages is to the Transcript of Record; Stip. refers to Stipulation; par. refers to Paragraph; Dep. refers to Deposition of W. Frank Moulton, and Ex. refers to Exhibit.)

I.

The Decision Was Rendered Contrary to the Court's Rules.

Rule 15, Subdivision 2, provides: "One-half hour on each side shall be allowed to the argument of a motion. . . ."

In this case the motion of the Commissioner of Internal Revenue summarily to reverse was dated November 8, 1955, and the Court granted the motion on December 6, 1956, more than a year later, without setting the motion on the calendar for argument and without granting Wilshire Holding Corporation the one-half hour for argument as provided in Rule 15.

Rule 23 provides: "A petition for rehearing may be presented within thirty days after judgment. . . ." In the *Oesterrreich* case the Attorney General refused to file a petition for rehearing, and the Court denied leave to Wilshire to file a petition for rehearing as *amicus curiae*.

It is obvious that the spirit, if not the letter, of the Court's own rules was violated by the Court when it summarily granted the motion of the Commissioner of Internal Revenue summarily to reverse the decision of the Tax Court.

Counsel respectfully urge that the Court is in error when it states in its opinion summarily reversing the Tax

Court that "the Wilshire Holding Company had its day in Court." The Court is also in error when it states in its opinion that the Wilshire Holding Company "was permitted to use the full time assigned to the respondent for oral argument" in the *Oesterreich* case. While it is true that counsel for Wilshire did argue at the time of oral argument, the Attorney General's office representing the Commissioner of Internal Revenue also presented oral argument.

It is manifestly clear that Wilshire did not have its full day in Court, and it is also manifestly clear that the decision summarily to reverse the Tax Court did not give Wilshire full consideration on its merits, in view of the failure to permit oral argument by Wilshire in connection with the motion to reverse, and in failing to permit Wilshire to file a petition for rehearing in the *Oesterreich* case when the Attorney General refused to do so.

Since it appears that the Court was going to decide the Wilshire case on the basis of the *Oesterreich* case, it should have afforded every opportunity to Wilshire fully to present its position. This the Court did not do when it would not allow Wilshire to file a petition for rehearing. Furthermore, Wilshire did not have its full day in Court when it was not afforded the opportunity orally to argue the motion to reverse, for as stated in the written objections to the motion to reverse, the decision in the *Oesterreich* case was not necessarily controlling. Wilshire was and still is prepared to submit to the Court the contention that if any of its payments to *Oesterreich* are to be capitalized instead of deducted as a business expense, that such capitalization should not occur until the "purchase price" of the property is reached,

or in the alternative, if the "purchase price" of the property is to be capitalized from the first payments made to Oesterreich, that Wilshire should be entitled to deduct as a business expense the excess payments of the appraised value of the property as rental or interest payments.

These contentions are only properly presentable in the appeal taken by the Commissioner of Internal Revenue against Wilshire. They could not properly have been presented by Wilshire in the *Oesterreich* case because the question of capitalization of payments made by Wilshire is a matter that applies only to Wilshire. In short, the issue of capitalization of payments is something that can be applied only to Wilshire and not to Oesterreich, since the payments were being made by Wilshire and not by Oesterreich.

It is clear that the Court in reversing the Tax Court in the *Oesterreich* case in effect rewrote the agreement between Oesterreich and Wilshire. An instrument which everyone concerned for more than twenty years considered to be a lease was rewritten by the Court's decision so as to make it a contract of sale. As long as the Court was rewriting the agreement by its decision, surely it should have considered the question of capitalization of reasonable payments. To do otherwise reduces the situation to an absurdity. Stated briefly, the decision of the Court was that Wilshire shall pay as a capital investment \$679,000.00 for a piece of property which was considered to be worth only \$50,000.00, or at the most \$75,000.00 at the time the lease was drawn in 1929.

For the foregoing reasons, the decision summarily reversing the Tax Court was reached contrary to the Court's own rules, to-wit, Rules 15 and 23.

II.

The Decision Is Contrary to Law.

- A. Where There Is a Lease With a Right to Purchase, the Rental Payments Are Not Considered as Purchase Price Payments Until the Purchase Right Is Exercised or Exercisable, or Until It May Be Predicted With Certainty That the Right Will Be Exercised.

The Court in its decision has overlooked the authorities cited by Wilshire in its brief as *amicus curiae* in the *Oesterreich* case, wherein the courts considered the payments to be rent in similar cases.

Edward E. Haverstick, 13 B. T. A. 837;

Indian Creek Coal and Coke Company, 23 B. T. A. 950;

Rotorite Corporation v. Commissioner, 117 F. 2d 245;

Foellinger v. Smith, 29 A. F. T. R. 1416.

In a recent case, *Breece Veneer and Panel Company v. Commissioner of Internal Revenue*, 232 F. 2d 319, decided April 26, 1956 (subsequent to the decision in the *Oesterreich* case), the United States Court of Appeals for the Seventh Circuit ruled that payments made under a "lease and option to purchase" agreement constituted deductible rental expense.

In the *Breece Veneer and Panel Company* case the taxpayer entered into a "lease and option to purchase" agreement with the R. F. C. in 1943 with respect to certain property. Taxpayer was to pay \$100,000 in 60 monthly installments as "rent," after which it had the option to purchase the property for \$50,000. The taxpayer claimed the monthly payments as deductible rental

expense under Sec. 23(a)(1)(A), 1939 Code, but the Tax Court disallowed the claimed deductions on the ground that the taxpayer was acquiring, through the monthly payments, an equity in the property, and the evidence indicated the R. F. C. would not have sold the property for \$50,000, or any comparable amount. The property in question had a fair market value at the time of the agreement of \$376,500 and was insured for \$325,000. The evidence also showed that the R. F. C. was primarily interested in selling the property and for reasons of its own, was willing to sell for a price of \$150,000 to \$185,000.

The Court of Appeals reversed. The taxpayer was neither bound to pay rent substantially equal to the value of the property to obtain a deed, nor was it sure to become the owner. The amount of the rent after five years lacked the substantial sum of \$50,000 to make the taxpayer the owner. The Tax Court in applying the economic test erroneously considered the contract in retrospect. (*Benton* (C. A. 5), 197 F. 2d 745.) It was immaterial that the property proved to be a bargain to the taxpayer. The R. F. C. probably would not have sold the property for \$50,000 in 1943 but a large decline in the value could reasonably be expected by 1948. The plant was not modern and the equipment was old. However, the *Benton* case held that the economic test in itself is only one of the factors to be considered to determine the intention of the parties. The evidence relating to 1943 negates the intention of building up an equity. The taxpayer rented the whole of the premises, instead of 30% as it formerly did for \$700 per month. There was evidence that the fair gross rental value of the entire premises was \$45,000 per year. Taxpayer was threatened

by a possible lease of the entire property to another tenant, and it could reasonably anticipate a considerable reduction of its rent by a sublease of part of the premises to the other tenant.

The taxpayer in a 1941 letter to the R. F. C. had offered to buy its portion of the premises on a contract for deed for \$100,000 with a down payment of \$6,000 and later suggested a lease with the rent to apply on the purchase price. The intention of the parties cannot be determined unilaterally. The R. F. C. evidently did not agree with the taxpayer as to the terms of the contract and consummated the transaction in the form of a lease drawn by the R. F. C. with a sublease to the other tenant. The R. F. C. was attempting to protect itself in the transaction by a lease. In case of default in rent it would be easier to regain possession from a tenant than to foreclose or forfeit a contract to purchase and dispossess the purchaser. The taxpayer could exercise the option or not, but in the meantime the payments were neither to be applied on the purchase price, nor were the monthly payments to be made by the taxpayer more than the reasonable rental value.

B. A Review Is Limited to Questions of Law.

The Court in its decision in the *Oesterreich* case overlooked the principle of law that an Appellate Court will not weigh testimony, and as long as there is ample evidence in the record to sustain the findings of the lower court it will not reverse those findings of fact.

The Tax Court found that Exhibit 1 was a lease, on the basis of the evidence, both written and oral. Since there is a reasonable basis for the Tax Court's decision,

the Appellate Court should uphold the decision of the trier of fact.

Corn Products v. Commissioner of Internal Revenue, 76 S. Ct. Rep. 20.

Tax Court's findings of fact is not to be set aside by court, even if upon examination of evidence court might draw a different inference.

Jurs v. C. I. R. (C. C. A. 9, 1945), 147 F. 2d 805.

The skilled judgment of the Tax Court, which is the basic fact-finding and inference-making body, should be given wide range in tax proceedings involving factual disputes.

C. I. R. v. Scottish American Inv. Co. (1944), 65 S. Ct. 169.

It is province of Tax Court to determine facts.

Rider v. C. I. R. (C. A. 8, 1952), 200 F. 2d 524.

Inferences of fact made by Tax Court in tax case will not be disturbed on appeal by Court of Appeals unless clearly erroneous.

Benton v. C. I. R. (C. A. Tex., 1952), 197 F. 2d 745.

Strict findings of fact by the Tax Court are beyond controversy on petition to review the Tax Court's decision in the Court of Appeals.

Three States Lumber Co. v. C. I. R. (C. C. A. 7, 1946), 158 F. 2d 61.

Determination of a question of fact by Tax Court, supported by competent evidence, is not open for determination in Court of Appeals.

Welsbach Engineering & Management Corporation v. C. I. R. (C. C. A. 3, 1944), 140 F. 2d 584, cert. den. 64 S. Ct. 1261.

Other cases to the same effect are:

Aviation Club of Utah v. Commissioner, 162 F. 2d 984;

Richards v. Commissioner, 81 F. 2d 369;

American Pacific Whaling Co. v. Commissioner, 100 F. 2d 46;

Woodall v. Commissioner, 105 F. 2d 474;

Blair v. Curran, 24 F. 2d 390.

III.

The Decision Is Contrary to the Evidence.

A. The Real Intent of the Parties Was to Effect a Lease Rather Than a Sale.

In reversing the decision of the Tax Court in the *Oesterreich* case the reviewing Court disregarded the *real* intent of the parties and jumped to an erroneous conclusion that the intent of the parties was to transfer title. The evidence was clear that the parties intended a lease, not because they called it a lease but because all of the indicia of a lease were present:

1. During all of the years from 1929 on, Wilshire entered all amounts paid to Oesterreich as rental expense and reported it as such. [Stip. par. 8, p. 35 and pp. 68-69.]

2. Oesterreich entered all amounts received from Wilshire from the year 1929 on as rental income upon her

books and reported said amounts as rental income on her income tax returns. [Stip. par. 9, p. 35; pp. 68, 126-127.]

3. Never did it occur to Oesterreich that the instrument was not a lease, but rather a sale, until a revenue agent so advised her. [P. 139.] The agent's findings were included in a report dated December 14, 1948. [Pp. 16-20.] The revenue agent was reversed by the office of the Internal Revenue Agent in Charge, and Oesterreich was so advised on July 26, 1949. [Pp. 21-24.]

4. In January of 1929 the late A. H. Chotiner and his son Albert Jack Chotiner, officers of the corporate predecessor of Wilshire, informed W. Frank Moulton that they proposed to construct a theatre, and sought a long term ground lease. [Dep. pp. 6, 11.]

5. Oesterreich owned three lots on Wilshire Boulevard at Hamilton in Beverly Hills and informed Moulton she was willing to enter into a long term lease, but did not want to sell the land. [Dep. pp. 11, 33.] The Chotiners informed Oesterreich they wished to lease her land. Oesterreich said she was willing to enter into a long term ground lease if suitable terms could be arranged. [Pp. 145, 148.]

6. Negotiations extended over a period of approximately nine months and culminated in the making of a lease dated September 11, 1929. [Stip. par. 3, p. 33; Dep. pp. 41, 61, 83.]

7. During the negotiations Oesterreich stated on several occasions she did not expect to be alive at the end of the term of the lease and was indifferent to the disposition of the fee at that time, but was interested in securing a substantial rental during her lifetime. [P. 154; Dep. pp. 24, 27, 50, 64.]

8. No offer to buy the land was ever made during the course of negotiations. [Pp. 134, 160, 165; Dep. pp. 23, 31.]

9. Although it was alleged that an option was requested to purchase the land, Oesterreich refused to grant or allow an option to purchase. [Pp. 137-138; Dep. p. 36.]

10. At no time during the course of negotiations did either of the parties discuss the sale of the land, and Oesterreich did not offer to sell the land. [P. 146; Dep. pp. 22, 24-25.]

11. The parties did not discuss the value of the land at any time during the negotiations. [Pp. 165-166; Dep. pp. 26-27.]

12. The execution of the lease was not preceded by an oral agreement to purchase. [Dep. p. 31.]

13. The tax consequences of the lease were not considered by any of the parties. [P. 140.]

14. At the time the lease was negotiated the land had a value of not less than \$50,000.00 and not more than \$75,000.00. [P. 74; Dep. pp. 18, 46.]

15. Moulton, the real estate agent, was paid a commission by Oesterreich for finding a tenant. [Dep. pp. 19-22, 56, 63.]

16. There is a difference between a sales commission and a rental commission. [Dep. p. 21.] The commission for a sale was a straight 5%. [Dep. p. 57.] Rental commission is based on the Realty Board Book. [Dep. p. 58.] The Realty Board Book provides for 3% of the rentals for the first five years of the lease and 1½% on the rentals for the balance of the term.

17. The agreement of the parties was recorded in the office of the County Recorder as a lease. [Stip. par. 3, p. 33.]

18. The lease was executed by the parties after consultation and advice of their legal counsel. [Pp. 110-111.]

19. In financing the construction of the building a deed of trust was given as security. The deed of trust was prepared by the outstanding law firm of O'Melveny, Tuller and Myers, attorneys for the trustee Security-First National Bank of Los Angeles. The deed of trust referred to the provisions of the "Oesterreich lease," and recited that Oesterreich was the owner of the real property and that a leasehold interest was created by the lease. [Ex. 7; pp. 114-115, 155.]

20. The deed of trust was executed by Oesterreich after consultation and advice of her legal counsel. [Pp. 114-115.]

21. In 1940 Oesterreich and Wilshire entered into an agreement which provided that Oesterreich was the owner and Wilshire the present lessee. The agreement provided that in consideration of Oesterreich's joining in the execution of a note secured by a deed of trust on the said real property that the lessor (Oesterreich) was to receive \$7,500.00. [Ex. 8; pp. 121-122, 156-157.]

22. In 1944 Wilshire paid Oesterreich an additional \$2,500.00 to secure her signature as owner of the land to refinancing papers in connection with a new loan. [P. 158.]

23. Rental payments made pursuant to the lease were paid to a bank in Los Angeles in accordance with the assignment of rents executed by Oesterreich. [Ex. 14; pp. 169-170.]

24. On several occasions Oesterreich and Wilshire executed notices of non-responsibility which recited that Oesterreich was the owner and Wilshire the lessee. [Ex. 11; pp. 160-161.]

25. The rental payments from the 68-year term of the lease will aggregate almost \$700,000.00, approximately 10 to 14 times the value of the property. [Pp. 74, 166; Dep. pp. 18, 46; Ex. p. 1.]

The Court in holding that the transaction was a sale instead of a lease is rewriting an agreement entered into between parties who were represented by counsel.

The result of the Court's decision is highly artificial, because it is obvious that even if there really was "a sale" that a substantial part of each annual payment is attributable as interest. The denial of any deduction to the lessee—"purchaser" for these payments is grossly unfair. It should be noted in this connection that it now seems to be administrative policy in lease-purchase cases to recognize an interest deduction to the lessee-purchaser.

It is obvious that the rent being paid by Wilshire greatly exceeded the value of the remainder interest. The decision would be less unrealistic if it recognized that the "selling price" was only the reasonable value of the property so that the interest factor in the rents would be taxable to the lessor and deductible by the lessee.

B. There Was a Valuable Consideration for the Future Transfer of Title Other Than the Monthly Payments.

The Court in its decision overlooked the consideration which passed from the predecessor in interest of Wilshire to Oesterreich wherein Oesterreich had the use and advantage of Lot 555 and the northerly 40 feet of Lot 556, which the predecessor in interest of Wilshire purchased

and conveyed to Oesterreich so the additional land could be used for the construction of the theatre building.

The two lots which were purchased by Wilshire's predecessor were required and necessary to build a building large enough to accommodate a motion picture theatre of the size which was constructed. By so doing, additional rental for the theatre was obtained, which enabled the lessee of the Oesterreich property to pay a larger ground rental to Oesterreich. Accordingly, Oesterreich received a substantial benefit in return for which she was deeding the property at the end of 68 years.

The two lots purchased and conveyed to Oesterreich in 1929 cost the predecessor in interest of Wilshire \$19,-650.00. [Stip. par. 4, p. 34.]

The three lots owned by Oesterreich cost her \$24,235.05. [Pp. 32-33.]

The Court in its decision also overlooked the consideration which passed from the predecessor in interest of Wilshire to Oesterreich wherein the payments originally contemplated to increase from \$7,500.00 a year to \$12,-000.00 a year progressively, and then to remain at \$12,-000.00 a year at the end of fifty years until the termination of the lease 18 years thereafter, were changed so that Oesterreich received \$12,000.00 a year for the 11th to 28th years, and the payments diminished progressively from \$12,000.00 a year to \$7,500.00 a year from the 29th to the 68th year. This gave Oesterreich the advantage of additional funds during an earlier period of the lease.

The Court in its decision assumes that the transaction between Wilshire and Oestrerreich was a sale simply because Wilshire acquires title on the payment of \$10.00 at

the end of 68 years. The real consideration, however, is not \$10.00, but the use of the two lots which Oesterreich received as well as the use of larger early payments which were to be made at an earlier period during the lease, as set forth hereinabove.

It should be kept in mind that this is a single purpose building with the main tenant a motion picture exhibitor. What the future holds for the motion picture exhibiting business in 1997 is open to conjecture.

Whether the building in 1997 would be razed because of its unsuitability at that time is something that cannot be determined now except to say that motion picture theatre buildings ordinarily are not expected to be of value 68 years after their construction.

The Court in its decision has assumed that the land will become more valuable, but there was no evidence to show that the land would be more valuable in 1997 than at present. With the changing trends of migrations of peoples, businesses and industry, one cannot predict whether the land in question will be more valuable in 1997 than it is at present. Many areas in and about Los Angeles were thought to be on the upward trend in value, but subsequent events proved that they retrogressed instead.

The Court in its decision erred when it stated that the agreement provided for a tapering off of rental payments in later years because that was what the lessees could afford to pay. The record is silent as to what the lessees could afford to pay at the end of 28 years. The payments were reversed simply because Oesterreich wanted to get the bulk of the income as early as possible. [P. 154; Dep. pp. 24, 27, 50, 64.]

When the Court stated that the property will be worth perhaps ten times as much in 1997 as it was in 1946, it has endeavored to look into the future and foretell an event for which no evidence was submitted as to what the property would be worth in 1997.

Here again it should be kept in mind that this is a single purpose building.

According to Table 4, page 1089, Handbook of Financial Mathematics by Justice H. Moore of the Irving Trust Company published in 1944 by Prentice-Hall, Inc. (third printing), the following table sets forth the value of the reversions in 1929, assuming various fair market values of the three lots in 1929:

<u>Value of Land in 1929</u>	<u>Value of Reversion in 1929</u>
\$24,235.05	\$129.31
50,000.00	266.78
75,000.00	400.17

It will be seen that Oesterreich gave up very little when she agreed to sell her reversionary interest presumably for \$10.00. On the other hand, what she received was very substantial; she received the benefit of two lots which cost \$19,650.00; she received the benefit of \$12,000.00 a year rent after the first ten years, instead of having to wait 40 years for the rent to reach that figure.

In the event Wilshire defaults in any of the monthly payments to Oesterreich it not only could be dispossessed of the property, but Oesterreich would be entitled to keep title to the two lots which had been conveyed to Oesterreich by Wilshire's predecessor in interest.

It is far more realistic to say that the consideration for the transfer of title to the property at the end of 68 years was the use by Oesterreich of the two lots, with the

possibility that she would be entitled to retain title thereto, and the shifting of rental payments during the course of the lease hereinabove mentioned, than it is to say that Wilshire was paying almost \$700,000.00 for a piece of property which was never considered to be worth more than \$75,000.00 at the time the agreement was signed.

C. Wilshire Holding Corporation Has Not Acquired an Equity in the Property.

The Court in its decision ignores the fact that Wilshire to this date has not acquired an equity in the property, as the amount still owing under the contract is far in excess of the appraised value of the land. The land at the time of the hearing only had a value of \$100,000.00. [P. 74.] Therefore, no equity has been acquired.

When the unpaid balance under the contract has diminished to a point where it no longer exceeds the appraised value of the land, then that will be ample time to determine the question of whether Wilshire is acquiring an equity in the property. Until that point is reached, it is purely a payment of rent.

While it is true that the price of a piece of property on a deferred payment plan may be greater than a cash sale price, nevertheless the difference between the amount agreed to be paid under the contract and the appraised value of the land must not be so great and so disproportionate as in the present case.

The findings of the Tax Court are that the three lots were worth not more than \$50,000.00 in 1929, and not more than \$100,000.00 in 1946. [P. 178.] These findings are supported by the testimony of W. Frank Moulton, the real estate agent, that the property was worth \$50,000.00 [Dep. pp. 18, 46], and by the testimony of Albert

Jack Chotiner that it was worth between \$50,000.00 and \$75,000.00. [P. 166.]

It is beyond reasonable comprehension that \$679,000.00 would be paid for a piece of property that was appraised at only \$50,000.00 in 1929.

D. The Payments by Wilshire Holding Corporation Are Commensurate With the Benefits Derived by It.

The Court in its decision erred when it stated that the schedule of payments was not commensurate to the benefit derived by Wilshire from the occupancy and use of the land. The Court overlooked the fact that at an appraised value of \$50,000.00 as shown by the testimony, the yield for the first 10 years was 15% per annum; the yield for the next 18 years was 24% per annum; and the yield thereafter decreased from 24% to 15% per annum.

Surely that was a fair return to the lessor, and an expense commensurate with the benefit derived by Wilshire.

Accordingly, it is respectfully urged that on a rehearing the above entitled Court should set aside its decision summarily reversing the Tax Court, and should instead either set the matter on the calendar for hearing, granting the parties the right to file briefs on the merits in accordance with the rules of the Court, or the above entitled Court should affirm the decision of the Tax Court in the *Wilshire* case, relying on the decision of the Tax Court, the brief of the Attorney General in the *Oesterreich* case, the brief of Wilshire Holding Corporation as *amicus curiae* in the *Oesterreich* case, and the points and authorities cited herein.

Request for Hearing En Banc.

Because of the importance of the decision to be reached in this case and the fact that there is an apparent conflict in the decisions of various Circuit Courts of the United States in similar cases to the within action, it is respectfully requested and suggested that this case be heard *en banc*.

Dated: January 2, 1957.

Respectfully submitted,

MURRAY M. CHOTINER,

RUSSELL E. PARSONS,

By MURRAY M. CHOTINER,

Attorneys for Wilshire Holding Corporation.

Certificate of Counsel.

Murray M. Chotiner, one of counsel for Wilshire Holding Corporation, does hereby certify that in his judgment the Petition for Rehearing is well founded and is not interposed for delay.

MURRAY M. CHOTINER.

Certificate of Service.

I hereby certify that three copies of the foregoing Petition were on January 2, 1957 mailed to the attorney for the Commissioner of Internal Revenue, addressed as follows:

“Herbert Brownell, Jr., Attorney General,
Department of Justice, Washington, D.C.”,

and that three copies were mailed on January 2, 1957 to the attorney for Walburga Oesterreich addressed as follows:

“Charles I. Rosin, Attorney at Law,
408 South Spring Street, Los Angeles, California.”

MURRAY M. CHOTINER,

*Murray M. Chotiner of Counsel for
Wilshire Holding Corporation.*

No. 14106 ✓

United States
Court of Appeals
For the Ninth Circuit.

*See Vols.
2853
3029*

LEW WAH FOOK, as Guardian Ad Litem for
LEW SUEY YET, Also Known as LEW
THEW YUT,

Appellant,

VS.

HERBERT BROWNELL, JR., as Attorney Gen-
eral of the United States,

Appellee.

Transcript of Record

Appeal from the United States District Court for the
Southern District of California,
Central Division.

FILED

JAN - 6 1954

No. 14106

United States
Court of Appeals
For the Ninth Circuit.

LEW WAH FOOK, as Guardian Ad Litem for
LEW SUEY YET, Also Known as LEW
THEW YUT,

Appellant,

vs.

HERBERT BROWNELL, JR., as Attorney Gen-
eral of the United States,

Appellee.

Transcript of Record

Appeal from the United States District Court for the
Southern District of California,
Central Division.

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS

For Appellant:

BRENNAN & CORNELL,
812 Rowan Bldg.,
458 S. Spring St.,
Los Angeles 13, Calif.

For Appellee:

LAUGHLIN E. WATERS,
United States Attorney;
CLYDE C. DOWNING,
MAX F. DEUTZ,
Assistants U. S. Attorney,
600 Federal Bldg.,
Los Angeles 12, Calif.

In the United States District Court in and for the
Southern District of California, Central Division

No. 14320-WB

LEW WAH FOOK as Guardian Ad Litem for
LEW SUEY YET, a/k/a LEW THEW YUT,
Plaintiff,

vs.

JAMES P. McGRANERY, as United States Attorney General,
Defendant.

PETITION TO ESTABLISH NATIONALITY;
DECLARATORY JUDGMENT UNDER
SECTION 503 OF THE NATIONALITY
ACT OF 1940

Comes now the plaintiff, Lew Suey Yet, a/k/a Lew Thew Yut, by his guardian ad litem, Lew Wah Fook, and complains of the defendant and for cause of action alleges:

I.

For the purpose of this action, Lew Wah Fook was appointed by the above-entitled Court and now is the guardian ad litem of plaintiff, Lew Suey Yet, a/k/a Lew Thew Yut;

II.

That said plaintiff is a true and lawful blood child of Lew Wah Fook who is a citizen of the United States; that as evidence of his United States citizenship, Lew Wah Fook holds Certificate of Identity

No. 47503 issued September 22, 1923, by the Immigration Office at San Francisco, California; that said Lew Wah Fook was born at Lung Uck Village, Hoy San District, China, on January 18, 1913 (CR 1-12-12); [2*]

III.

That the said Lew Wah Fook was admitted to the United States as the son of a Native, at San Francisco, California, when he arrived on August 23, 1923, on the SS President Taft (File No. 22492/6-10); that Lew Wah Fook has been a permanent resident of the United States since August 23, 1923; that said Lew Wah Fook has made two trips from the United States to China, as follows, to wit:

Departed from San Francisco, August 30, 1929, via SS President Jefferson, and returned to San Francisco in March, 1931, via SS President Pierce;

Departed from San Francisco, December 1, 1932, via SS President Coolidge, and returned to San Francisco on July 13, 1953, via SS President Hoover.

IV.

That the said Lew Wah Fook was first married to Huie Shee on November 10, 1929 (CR 18-10-10), at Lung Uck Village, Hoy San District, China; that such marriage was contracted in accordance with the marriage customs and ceremonies approved and legally recognized in China; that no official record

***Page numbering appearing at foot of page of original Certified Transcript of Record.**

of such marriage is available in China, so far as the said Lew Wah Fook is informed; that the plaintiff Lew Suey Yet, a/k/a Lew Thew Yet, was born September 9, 1935 (CR 24-8-12), at Lung Uck Village, Hoy San District, China; that the plaintiff, Lew Suey Yet, a/k/a Lew Thew Yut, is issue of the aforesaid marriage of Lew Wah Fook and Huie Shee; that the aforesaid marriage and the birth of said plaintiff was duly reported to the Immigration and Naturalization Service by the said Lew Wah Fook upon each and every occasion of his examination by that service;

That the said Lew Wah Fook was married a second time, after the death of his first wife on July 3, 1947, at Lung Uck Village, Hoy San District, China; to Huang Chee at Los Angeles, California, on [3] March 31, 1948. That said Lew Wah Fook and said Huang Chee are now living in Los Angeles, California.

V.

That the said Lew Wah Fook is and has been continuously since 1923, a resident within the Southern District of California, Central Division; that the petitioner, Lew Suey Yet a/k/a Lew Thew Yut, claims permanent residence in the Southern District of California, Central Division, and within the jurisdiction of this Court.

VI.

That the said Lew Wah Fook caused to be filed with the United States Department of Justice, on or about the 27th day of May, 1951, an application

for admission to the United States, at Terminal Island, San Pedro, California, in behalf of the plaintiff herein; that the said plaintiff was advised by the United States Department of Justice at Terminal Island, San Pedro, California, on the 7th day of July, 1952, that said petitioner's application for admission had been denied; that the said Lew Suey Yet a/k/a Lew Thew Yut claims that the refusal of the United States Department of Justice to permit his admission to the United States is an arbitrary and unreasonable refusal or denial of a right or privilege of a United States national.

VII.

That the defendant is the duly appointed, qualified and acting Attorney General of the United States; that the plaintiff's application for admission to the United States was denied by the United States Department of Justice on the 7th day of July, 1952; that the United States Department of Justice did, on the 7th day of July, 1952, deny the plaintiff a right or privilege as a national of the United States.

VIII.

That this complaint is filed and these proceedings are instituted against the defendant under Section 503 of the Nationality Act of 1940 (54 Stat. 1171, 1172, 8 U.S.C. 903), for a judgment declaring [4] the plaintiff to be a national of the United States.

IX.

That the plaintiff has never committed any act of or executed any instrument of expatriation nor

renounced his United States citizenship; that the plaintiff is entitled to be declared a national of the United States.

X.

That the plaintiff, Lew Suey Yet, a/k/a Lew Thew Yut, claims to be a United States citizen and/or national, such citizenship and/or nationality having been acquired pursuant to the provisions of Section 1993, Revised Statutes of the United States, as amended by the Act of May 24, 1934, and Section 201 (g) of the Nationality Act of 1940 (8 U.S.C.A. 601 (g)).

Wherefore, plaintiff prays for judgment declaring him to be a national of the United States and for such other and further relief as may be just and proper.

BRENNAN & CORNELL,

By /s/ BERNARD BRENNAN,

Attorneys for Plaintiff.

Duly verified.

[Endorsed]: Filed July 10, 1952 [5]

[Title of District Court and Cause.]

ANSWER

Comes Now the defendant, James P. McGranery, as United States Attorney General, through his attorneys, Walter S. Binns, United States Attorney for the Southern District of California, and Clyde C. Downing and Arline Martin, Assistant United

States Attorneys for the Southern District of California, and in answer to plaintiff's Complaint herein, admits, denies and alleges as follows:

I.

Admits the allegations contained in Paragraph I of plaintiff's Complaint.

II.

Referring to the allegations contained in Paragraph II of said Complaint, admits that Lew Wah Fook holds Certificate of Identity No. 47503 issued September 22, 1923, by the Immigration and Naturalization Service at San Francisco, California, and admits that said Lew Wah Fook was born at Lung Uck Village, Hoy San District, China, on January 16, 1916 (CR 4-12-12); denies each and every other allegation contained in Paragraph II of said Complaint. [11]

III.

Referring to the allegations contained in Paragraph III of said Complaint, defendant has no knowledge or information sufficient to form a belief as to whether or not Lew Wah Fook has been a permanent resident of the United States since August 23, 1923, and on that ground, denies said allegation; admits each and every other allegation in said Paragraph III contained except alleges that said Lew Wah Fook returned to San Francisco from China on April 5, 1931, instead of March, 1931, and that he departed from San Francisco December 2, 1932, and returned to San Francisco July 31, 1935.

IV.

Referring to the allegations contained in Paragraphs IV and V of said Complaint, defendant has no knowledge or information sufficient to form a belief as to the truth of the allegations contained in said Paragraphs IV and V, and on that ground, denies said allegations.

V.

Referring to the allegations contained in Paragraph VI of said Complaint, denies each and every allegation contained therein, but admits that the defendant as head of the Department of Justice, through its agent, the Immigration and Naturalization Service, on June 28, 1951, refused to admit plaintiff to the United States on the grounds that he was not a citizen of the United States, after a hearing by a Board of Special Inquiry, and alleges that on July 1, 1952, the Board of Immigration Appeals dismissed plaintiff's appeal from that decision.

VI.

Referring to the allegations contained in Paragraph VII of said Complaint, admits that the defendant is the duly appointed, qualified and acting Attorney General of the United States, and the head of the Department of Justice; denies each and every other allegation in said allegation contained, and refers again to defendant's allegations contained in Paragraph V above.

VII.

Referring to the allegations contained in Paragraph VIII of said Complaint, defendant neither

admits nor denies the allegations contained therein, the same being a conclusion of law. [12]

VIII.

Referring to the allegations contained in Paragraphs IX and X of said Complaint, denies each and every allegation contained in said Paragraphs IX and X.

For a Further, Separate and Second Defense Defendant Alleges:

I.

The Complaint of plaintiff fails to state a claim upon which relief can be granted.

Wherefore, defendant prays for a judgment dismissing said Complaint and denying the relief prayed for therein.

WALTER S. BINNS,
United States Attorney;

CLYDE C. DOWNING,
Assistant U. S. Attorney,
Chief of Civil Division;

/s/ ARLINE MARTIN,
Assistant U. S. Attorney,
Attorneys for Defendant.

Affidavit of service by mail attached.

[Endorsed]: Filed August 11, 1952. [13]

[Title of District Court and Cause.]

STIPULATION FOR SUBSTITUTION OF
HERBERT BROWNELL, JR., AS UNITED
STATES ATTORNEY GENERAL, AS
PARTY DEFENDANT

It Is Hereby Stipulated, pursuant to the provisions of Rule 25 (d), Federal Rules of Civil Procedure, that Herbert Brownell, Jr., as United States Attorney General, be substituted as party defendant in the above-entitled case.

Dated: April 21, 1953.

BRENNAN & CORNELL,
By /s/ BERNARD BRENNAN,
Attorneys for Plaintiff.

WALTER S. BINNS,
United States Attorney;

CLYDE C. DOWNING,
Assistant U. S. Attorney,
Chief of Civil Division;

/s/ HARRY R. TALAN,
Acting Assistant U. S. Attorney, Attorneys for
Defendant.

It Is So Ordered:

This 21st day of April, 1953.

/s/ HARRY C. WESTOVER,
United States District Judge.

[Endorsed]: Filed April 21, 1953. [16]

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above-entitled case having come on for trial on April 21, 1953, and having been tried on April 21 and April 22, 1953, before the Honorable Harry C. Westover, Judge Presiding, without a jury, the plaintiff appearing by his attorney, Bernard Brennan, and the defendant appearing by his attorneys, Walter S. Binns, United States Attorney; Clyde C. Downing, Assistant United States Attorney, Chief, Civil Division; and Harry R. Talan, Acting Assistant United States Attorney, and evidence having been introduced on behalf of the plaintiff, and the defendant and the Court having considered the same, and having heard the arguments of counsel, and being advised in the premises, makes the following Findings of Fact and Conclusions of Law:

Findings of Fact

I.

That Herbert Brownell, Jr., is the duly appointed and qualified and acting Attorney General of the United States of America, and as such, is the head of the [18] Department of Justice, and in such capacity is the executive head of said United States Department of Justice, of which the Immigration and Naturalization Service is a Department.

II.

That on or about June 28, 1951, a Board of Spe-

cial Inquiry of said Immigration and Naturalization Service ordered the plaintiff herein excluded from the United States on the ground that said plaintiff is not a citizen of the United States, and was not in possession of a valid immigration visa or of a passport or documents in lieu of a passport issued by the country to which he owes allegiance.

III.

That Lew Wah Fook, alleged father of the plaintiff herein, was on or about September 23, 1923, admitted to the United States from China, as the son of a native and was issued Certificate of Identity No. 47503 by the Immigration and Naturalization Service at San Francisco, California.

IV.

That the plaintiff herein claims permanent residence in the Southern District of California, Central Division.

V.

That the plaintiff herein was permitted to travel to the border of the United States by virtue of Travel Affidavit No. 2694 and was there, on or about May 26, 1951, taken into custody by the Immigration and Naturalization Service and held in exclusion status pending determination of his status by a Board of Special Inquiry.

VI.

That the Board of Special Inquiry of the Immigration and Naturalization Service held at San Pedro, California, on June 28, 1951, determined that the plaintiff herein was not a citizen of the

United States, and was not admissible to the United States as such.

VII.

That on July 1, 1952, the Board of Immigration Appeals affirmed the decision that the plaintiff herein was not a citizen and should be excluded [19] from the United States; that thereafter, on July 10, 1952, plaintiff herein filed this judicial proceeding to have his claim of citizenship determined by this Court.

VIII.

That the credibility of the witness Lew Wah Fook, alleged father of the plaintiff herein, has been so impeached that, as a result, the Court does not believe the testimony of the said plaintiff, the witness Lew Wah Fook, or other witnesses, and there is insufficient credible evidence to support plaintiff's claim that he is a citizen of the United States.

IX.

That the plaintiff herein was born in China, but that said plaintiff is not the son of Lew Wah Fook, and is not a citizen of the United States.

Conclusions of Law

I.

The jurisdiction of this Court in the above-entitled action is pursuant to the Act of October 14, 1940, Ch. 876, Title I, Subch. 5, Section 503, 54 Stat. 1171 (8 U.S.C. 903).

II.

The decision that plaintiff herein was not a citizen

and should be excluded from the United States was affirmed by the Board of Immigration Appeals on July 1, 1952, and thereafter on July 10, 1952, the plaintiff filed this judicial proceeding to have his claim of citizenship determined by this Court.

III.

The burden is on the plaintiff herein to establish his claim to United States citizenship, and the said plaintiff has failed to sustain such burden, and the Court concludes that the plaintiff Lew Suey Yet, a/k/a Lew Thew Yut, is not a national or citizen of the United States, and is not a son of Lew Wah Fook.

IV.

Judgment should be entered in favor of the defendant and against the plaintiff in the above-entitled action, dismissing the plaintiff's [20] Complaint and Cause of Action and adjudging that said plaintiff is not a citizen of the United States and directing that said plaintiff be excluded from the United States and returned to China, and that costs be awarded the defendant in this action.

Dated: May 12th, 1953.

/s/ HARRY C. WESTOVER,
U. S. District Judge.

Presented by:

/s/ HARRY R. TALAN,
Acting Asst. U. S. Attorney.

Receipt of copy acknowledged.

[Endorsed]: Filed May 12, 1953. [21]

In the United States District Court in and for the
Southern District of California, Central Division

No. 14320-HW

LEW WAH FOOK, as Guardian Ad Litem for
LEW SUEY YET, a/k/a LEW THEW YUT,

Plaintiff,

vs.

HERBERT BROWNELL, JR.,

Defendant.

JUDGMENT

The above-entitled case having come on for trial on April 21, 1953, and having been tried on April 21 and April 22, 1953, before the Honorable Harry C. Westover, Judge Presiding, without a jury, the plaintiff appearing by his attorney, Bernard Brennan, and the defendant appearing by his attorneys, Walter S. Binns, United States Attorney; Clyde C. Downing, Assistant United States Attorney, Chief, Civil Division; and Harry R. Talan, Acting Assistant United States Attorney, and the Court having considered and heard the arguments of counsel, and the Court having considered the same and the cause having been argued and submitted to the Court for its decision, and the Court having heretofore made and filed its Findings of Fact and Conclusions of Law and having ordered that a Judgment be entered in accordance therewith:

Now, Therefore, It Is Ordered, Adjudged and Decreed:

I.

Judgment is hereby entered for the defendant and against the plaintiff in the above action and it is hereby adjudged that the Complaint and cause [22] of action shall be and the same are hereby dismissed and the plaintiff, Lew Suey Yet, a/k/a Lew Thew Yut, is not a citizen or national of the United States.

It is hereby directed that said plaintiff be excluded from the United States and returned to China, and that the defendant recover his costs in this action.

Costs taxed at \$20.00.

Dated: This 12th day of May, 1953.

/s/ HARRY C. WESTOVER,
Judge, United States District
Court.

Receipt of copy acknowledged.

[Endorsed]: Filed May 12, 1953.

Docketed and entered May 14, 1953. [23]

[Title of District Court and Cause.]

NOTICE OF APPEAL TO COURT OF
APPEALS UNDER RULE 73 (B)

Notice is Hereby Given that:

Lew Wah Fook as Guardian Ad Litem for Lew Suey Yet, also known as Lew Thew Yut, plaintiff

above named, hereby appeals to the United States Circuit Court of Appeals for the Ninth Circuit from the final judgment entered in this action on May 14, 1953.

Dated: July 6, 1953.

BRENNAN & CORNELL,
By /s/ WM. E. CORNELL,
Attorneys for Plaintiff.

[Endorsed]: Filed July 10, 1953. [24]

[Title of District Court and Cause.]

ORDER EXTENDING TIME ON APPEAL

Upon motion by counsel for plaintiff, and there being no objection from counsel for the defendant, and good cause appearing therefore;

It is Ordered that the time to file the record on appeal is hereby extended 90 days from the Notice of Appeal herein.

Dated: August 19, 1953.

/s/ BEN HARRISON,
United States District Judge.

[Endorsed]: Filed August 1, 1953. [28]

In the United States District Court, Southern
District of California, Central Division

No. 14320-HW Civil

LEW WAH FOOK, as Guardian Ad Litem for
LEW SUEY YET, Also Known as LEW
THEW YUT,

Plaintiff,

vs.

HERBERT BROWNELL, as United States At-
torney General,

Defendant.

Honorable Harry C. Westover, Judge Presiding.

REPORTER'S TRANSCRIPT OF
PROCEEDINGS

April 21, 1953

Appearances:

For the Plaintiff:

BRENNAN & CORNELL, By
BERNARD BRENNAN, ESQ.,
453 South Spring Street,
Los Angeles 13, California.

For the Defendant:

WALTER S. BINNS,
United States Attorney, By
HARRY R. TALAN, ESQ.,
Assistant United States Attorney.

April 21, 1953—2:00 P.M.

The Clerk: Trial in the case of Lew Wah Fook vs. McGranery. I don't believe in this case there has been a substitution as yet.

Mr. Brennan: We have the substitution stipulation signed, your Honor. I assume your Honor will wish the usual exclusion?

The Court: Yes. I want all the witnesses excluded except the plaintiff and the party on the stand.

May I suggest to counsel I have a criminal case set for trial on Thursday. If you don't finish this case by Wednesday night, it will be necessary to go over to next week some time.

Mr. Brennan: I will do the best I can, your Honor.

The Court: I know you don't want to be here the first of next week.

Mr. Brennan: No. I don't.

The Court: Swear the interpreter.

(Whereupon, George Lee was sworn to interpret from English to Chinese and Chinese to English.)

Mr. Brennan: We will call Lew Wah Fook. [3*]

LEW WAH FOOK

called as a witness herein by and on behalf of the plaintiff, having been first duly sworn, was ex-

*Page numbering appearing at top of page of original Reporter's Transcript of Record.

(Testimony of Lew Wah Fook.)

amined and testified through the interpreter as follows:

The Clerk: Will you be seated and state your name, please?

The Witness: Lew Wah Fook.

Direct Examination

By Mr. Brennan:

Q. Where do you reside?

A. 115 Vermont Street, Los Angeles.

Q. How long have you been a resident of Los Angeles County last past? A. 1935 till now.

Q. Where were you born?

A. Canton, Toy Shan, China.

A. What village? A. Lung Ock, O-c-k.

Q. Would that also be Lung Uck phonetically?

The Interpreter: It could be U-c-k or O-c-k, either would be right.

Q. (By Mr. Brennan): When were you born?

A. First year CR, 12th month, 12th day. [4]

Q. Is that the first or the fourth year?

A. First year.

Mr. Brennan: What is that translated in the English calendar?

The Interpreter: January 18, 1913.

Mr. Brennan: Is that January 18?

The Interpreter: January 18, 1913.

Mr. Brennan: Your Honor, at this time may we amend the petition on page 1, lines 31 and 32, by

(Testimony of Lew Wah Fook.)

interlineation to conform to the proof, so that the birth date is January 18, 1913, CR 1-12-12?

The Court: It may be amended.

Mr. Brennan: Counsel, is there any contention raised that the witness is not a citizen of the United States?

Mr. Talan: No, we raise no contention.

Mr. Brennan: It is conceded that he is, is that right?

Mr. Talan: We will concede that.

Q. (By Mr. Brennan): When did you first come to the United States?

A. CR, 12, 6th month.

The Interpreter: 1923, latter part of July and the first part of August.

Q. (By Mr. Brennan): Where did you enter the United States? A. San Francisco. [5]

The Court: It seems to me the best evidence is the certificate that was filed with the immigration authorities.

Did you file a certificate or file a statement?

Mr. Brennan: There was a certificate of identity issued at that time.

The Court: I know, but how about the memorandum he filed with the immigration authorities?

Mr. Brennan: I don't think they filed that type of memorandum on the first entry. It is for the trips. After the entry, when he makes a trip, but not for the original entry.

The Court: All right.

(Testimony of Lew Wah Fook.)

Q. (By Mr. Brennan): You arrived by boat, did you? A. Yes.

Q. Did you make trips back to China?

A. I made two trips.

Q. When did you depart for the first trip?

A. CR 18, which is 1929, some time in August.

The Court: May I ask a question? How old were you when you made this first trip back to China?

The Witness: 18.

The Court: By Chinese reckoning?

The Witness: Chinese reckoning. [6]

Q. (By Mr. Brennan): When did you return?

A. CR 20, 2nd month, 16th day, approximately.

Mr. Brennan: What is that?

The Interpreter: 1931, April 3.

Q. (By Mr. Brennan): When did you depart on the second trip? A. In November, 1932.

Q. When did you return? A. May, 1935.

Q. Did you make both of those trips both ways by boat and each time leave and return from San Francisco? A. Yes, each time.

Q. Were you married in China? A. Yes.

Q. When were you married?

A. CR 18, 10th month.

The Interpreter: 1929, November.

Q. To whom were you married?

A. Huie Shui Yee.

Mr. Brennan: Could that be spelled H-u-i-e S-h-e-e, phonetically?

The Interpreter: Yes.

(Testimony of Lew Wah Fook.)

Q. (By Mr. Brennan): Were you married in the same village where you were [7] born?

A. Yes, same village.

Q. Was any official record made of the marriage so that that would be available now?

A. By Chinese custom, there is no official record.

Q. Were you married on this occasion in accordance with the Chinese marriage custom and ceremony?

A. Yes.

Q. Did you have any children issue of that marriage?

A. Yes.

Q. What is your oldest child's name?

A. Lew Mon Soong.

Q. When was he born?

A. CR 19, 9th month, 9th day.

The Interpreter: 1930, November 9.

Q. That was a son? A. Yes.

Q. What is the name of your next boy?

A. Lew Mon Hing or Hung.

Q. Is that a son? A. Yes.

Q. When was he born?

A. CR 22, 11th month, 15th day.

The Interpreter: 1933, December 2.

Q. What is your next child's name? [8]

A. Lew Suey Yut.

The Interpreter: L-e-w S-u-y Y-u-t.

Q. Is that a son? A. Yes.

Mr. Brennan: Can that be spelled S-u-e-y or S-u-e-y and T-h-e-w, as well?

The Interpreter: Yes.

(Testimony of Lew Wah Fook.)

Mr. Brennan: And can the other be spelled Y-u-t or Y-e-t?

The Interpreter: Yes.

Q. (By Mr. Brennan): When was he born?

A. CR 24, 8th month, 12th day.

The Interpreter: September 9, 1935.

Q. Do you have any other children born of that marriage? A. Yes.

Q. What is the name of the other child, the next child? A. Lew Mon Tang, T-a-n-g, or T-i-n-g.

Q. Is that a son? A. Yes.

Q. When was he born?

A. CR 35, 11th month, 24th day.

Q. When was that?

The Interpreter: That is January 6, 1937. [9]

Mr. Brennan: 1937 or 1947?

The Interpreter: I am sorry. That is my error. December 17, 1946.

Q. (By Mr. Brennan): Were any other children born of that marriage? A. That's right.

Q. Is your wife, Huie Shee, still living?

A. No.

Q. When did she die?

A. She died CR 36, about the 5th month.

Q. Is that 5th month by Chinese calendar?

A. Chinese.

The Interpreter: The latter part of June or the early part of July, 1947.

Q. Are all four sons that you mentioned still living? A. Yes.

Q. Where is your oldest son, Lew Mon Soong?

(Testimony of Lew Wah Fook.)

A. Here in Los Angeles.

The Court: Has he been admitted?

Mr. Brennan: Yes, your Honor. We will use him as a witness later.

Q. He came into court with you today and was sent to the witness room? A. Yes.

Q. Where is Lew Mon Hing? [10]

A. Here, also.

Q. Did he come into court with you and go to the witness room a little while ago? A. Yes.

Q. Where is Lew Suey Yet?

A. He is sitting at the table.

Mr. Brennen: May the record show the witness is looking in the direction of counsel table and identified the plaintiff? I will ask him to stand.

(Man at counsel table standing.)

Q. Is this Lew Suey Yet that you identified as your son? A. Yes.

Q. Where is Lew Mon Tang?

A. In China, in the village.

Q. Did you remarry?

A. Yes, I remarried.

Q. And when? A. March 31, 1948.

Q. Where were you married; in the same village where you were born?

A. No. In Los Angeles.

Q. Where did your first wife die?

A. In our village, in China.

Q. Were all four of your sons born in the village where [11] you were born?

(Testimony of Lew Wah Fook.)

A. Yes, all the same.

Q. To whom are you now married?

A. Wong Chee, W-o-n-g C-h-e-e.

Mr. Brennan: Could that be spelled H-u-a-n-g?

The Interpreter: Yes.

Mr. Brennan: May we have this document marked for identification?

The Court: It may be marked Plaintiffs' Exhibit 1 for identification only.

The Clerk: So marked.

(The document referred to was marked as Plaintiff's Exhibit No. 1 for identification.)

Mr. Brennan: And the next document, also.

The Court: Plaintiff's Exhibit 2 for identification only.

The Clerk: So marked.

(The document referred to was marked as Plaintiff's Exhibit No. 2 for identification.)

Q. (By Mr. Brennan): I show you Plaintiff's Exhibit No. 1 for identification and ask you if this is your signature appearing on the line entitled "Signature Applicant" at the bottom of the page.

A. Yes. It looks like my signature. [12]

Q. On your return to the United States on your first trip to China, did you come back on the President Pierce? A. Yes.

Q. At the time of your entry into San Francisco, did you make a statement to an officer of the United

(Testimony of Lew Wah Fook.)

States Immigration Service at the time of your entry into San Francisco?

A. Yes, while I was still on board.

Q. Did you give that officer the information that your name was Lew Wah Fook and also Lew Choon Hin?

A. Yes.

Q. Is Lew Choon Hin your married name?

A. Yes.

Q. Did you give them the information that you were married once to Huie Shee, CR 18-10-10, natural feet, Lung Ock Village, S.N.D.?

A. Yes.

Q. Did you give them the information that you had one child, one son, no daughters, and that your wife was not then pregnant?

A. Yes.

Q. Did you also give them the information that that son's name was Lew Moon Sheung, age 2, sex M, birth date CR 19-9-19, Lung Ock Village?

A. Yes. [13]

Q. Was that information that you gave them as I have outlined it correct?

A. That was correct.

Mr. Brennan: May we offer in evidence Plaintiff's Exhibit 1, your Honor?

Mr. Talan: No objection.

The Court: It may be admitted.

The Clerk: So marked, Plaintiff's Exhibit No. 1 in evidence.

(The document referred to was received in evidence and marked as Plaintiff's Exhibit No. 1.)

(Testimony of Lew Wah Fook.)

Q. (By Mr. Brennan:) I show you Plaintiff's Exhibit No. 2 for identification bearing date July 31, 1935, and ask you if that is your signature at the bottom of the page? A. Yes.

Q. On your return from your second trip, did you come in on the President Hoover?

A. Yes.

Q. And on your entrance were you interviewed and did you give information to an officer of the United States Immigration and Naturalization Service in San Francisco, or in the Bay? A. Yes.

Q. And did you give them the information, in addition [14] to your name and the fact of your marriage, that at that time you had two children, being both sons, no daughters, and that your wife was pregnant seven months? A. Yes.

Q. Did you give them the information that the two sons' names were Lew Moon Seung, age 6, and Lew Moon Hin, age 3, both under sex M, and the birth date of the first being CR 19-9-19, at Lung Ock Village, and the second being CR 22-12-5, at Lung Ock Village? A. Yes.

Q. Is that information correct as to the birth date of your second son, Lew Mon Hin, or was it CR 22-11-15? A. CR 22-12-5, was correct.

Mr. Talan: Mr. Brennan, you might ask him about the older boy, too. There is a variance in those dates.

Q. (By Mr. Brennan): Is this date correct, CR 19-9-19, or is it CR 19-9-9?

A. 19 is correct.

(Testimony of Lew Wah Fook.)

Mr. Brennan: We'd better get the translation this time of CR 19-9-19.

The Interpreter: November 9, 1930.

Mr. Brennan: I thought you gave that as CR 19-9-9?

The Interpreter: Originally, he gave it as CR 19-9-9.

Mr. Brennan: Yes, that is correct, and the interpretation of that was November 9, 1930. [15]

The Interpreter: Yes, that's right.

Mr. Brennan: The Interpreter has given the interpretation of CR 19-9-19 as November 9, 1930, also.

The Court: Is there any difference here in 10 days?

The Interpreter: CR 19-9-19 is November 9, 1930.

Mr. Brennan: What is CR 19-9-9?

The Interpreter: October 30, 1930.

Mr. Brennan: Then the original interpretation of CR 19-9-9 should have been October 30, 1930, is that correct, Mr. Interpreter?

The Interpreter: That is correct.

Mr. Brennan: May we have the interpretation of CR 22-12-5?

The Interpreter: CR 22-12-5 is January 19, 1934.

Q. (By Mr. Brennan): Was the information you furnished to the officer of the Immigration and Naturalization Service that I have just referred to correct? A. Yes.

(Testimony of Lew Wah Fook.)

Mr. Brennan: We offer into evidence at this time Plaintiff's Exhibit 2.

The Court: It may be received.

The Clerk: So marked, Plaintiff's Exhibit 2 in evidence. [16]

(The document referred to was received in evidence and marked as Plaintiff's Exhibit No. 2.)

The Court: May I inquire, do you claim that the information upon the memorandum is wrong or the testimony of the witness as given here is wrong?

Mr. Brennan: The witness has now said that the information on the memorandum is correct and he was in error on the dates that he gave in his earlier testimony.

The Court: Today?

Mr. Brennan: That is correct.

The Court: In other words, he is saying the information he gave back in 1931 and 1935 is correct and if there is a mistake, it is in his testimony today?

Mr. Brennan: That is what he has testified to.

Q. How old was your son, Lew Mon Soong, when you left China on your return from your first trip?

A. By Chinese reckoning, it is around two years old.

The Court: Just a minute. Let me get something straight. The plaintiff is No. 3 child, is that correct?

Mr. Brennan: That is correct.

(Testimony of Lew Wah Fook.)

The Court: He says now when he left China on his first trip, the plaintiff was two years old.

Mr. Brennan: That checks.

The Court: Is he talking about the plaintiff?

Mr. Brennan: No. I asked for Lew Mon Soong by name, [17] your Honor.

The Court: All right. That is my mistake then.

Q. (By Mr. Brennan): When did you next see Lew Mon Soong?

A. On my next trip to China, English date 1932.

The Court: How old was your boy at that time, when you returned to China?

The Witness: Approximately three.

The Court: You mean to tell me that your first trip to China, you came over to this country, remained here approximately a year, and then went back to China?

The Witness: A little over a year.

The Court: And when you went back to China, your boy was then three years old?

The Witness: Chinese reckoning, three approximately three.

The Court: On these ages, when he left China, the boy was two years old, he said. Is that in Chinese reckoning?

The Witness: Yes, Chinese reckoning.

The Court: And when he came back, the boy was three years old, and that is Chinese reckoning?

The Witness: About three, three or four.

The Court: All right.

Q. (By Mr. Brennan): In Plaintiff's Exhibit 2, you state when you returned [18] from China,

(Testimony of Lew Wah Fook.)

your son Lew Mon Soong was six years old. Was that by Chinese reckoning?

A. Are you referring to the first trip or the second trip?

Q. When you came back to the United States on the second trip.

The Court: You said a minute ago on the first trip.

Mr. Brennan: I withdraw the question.

The Court: There's something wrong somewhere. Let's get this thing straightened out.

Q. (By Mr. Brennan): When you returned from China on your second trip in 1935, you state on Plaintiff's Exhibit 2, that your oldest son, was then six years old. Was that according to Chinese count? A. Yes.

Q. Is that correct as to his approximate age?

A. Yes.

The Court: Now, may I ask a question? How long did you stay in China on this first trip?

The Witness: On my first trip, a little over a year, a year and few months.

The Court: You said a minute ago when you left China on your first trip, that the boy was approximately two years old, Chinese. When you returned to China, he was approximately three years old Chinese. You said that you remained in China [19] approximately a year. Now, you say that when you—let's withdraw that and let's start all over.

You say that when you returned to China the second time that you—well, let's go ahead. I am all confused. Something is wrong here somewhere.

(Testimony of Lew Wah Fook.)

Mr. Brennan: I know what it is, your Honor.

The Court: Something is certainly wrong.

Q. (By Mr. Brennan): You remained in China on your first trip a little over a year, is that correct?

A. Yes.

Q. On your second trip to China, you remained there approximately two and a half years, is that correct?

A. Yes, over two years.

Q. And your oldest boy, was two years old by Chinese reckoning when you left the first time, is that correct?

A. Yes.

Q. When you returned to China on your second trip, that boy was approximately three years old, or you said later three or four years old, is that correct?

A. Yes.

Q. And then when you left to come home at the end of the second trip, that boy, according to Chinese count, was approximately six years old, is that correct?

A. Yes. [20]

The Court: How long did you stay in China on the second trip?

The Witness: A little over two years, approximately two and a half years.

Mr. Brennan: Does that give your Honor the information?

The Court: That's all right. I had it all mixed up here.

Q. (By Mr. Brennan): When did you next see Lew Mon Soong?

A. Since '35?

Q. Yes. A. About in February in 1946.

Q. Where did you see him in February, 1946?

(Testimony of Lew Wah Fook.)

A. In the village at my house.

The Court: How old was the boy, at that time?

The Witness: About 17 or 18.

The Court: I understand you didn't see this boy, from the time he was six years old until he was 17 or 18?

The Witness: No. That's right.

Q. (By Mr. Brennan): How did you happen to be in the village in February, 1946?

A. I was with the United States Army at that time and I received a 90-day leave, and during that leave I went back to the village in China. [21]

Q. Approximately when did you get to the village on that trip;

The Court: What do you mean? He said he got there in February, 1946. You mean what time of the day or approximately what time of the month?

Q. (By Mr. Brennan): Approximately what time of the year and month did you arrive at the village on the 1946 trip?

A. CR 35, the first month, the 15th day.

The Interpreter: February 6, 1946.

Q. (By Mr. Brennan): How long did you remain in the village?

A. Approximately 80 days.

Q. With whom was Lew Mon Soong living at that time?

A. With my grandmother, with my wife, my brothers and sisters, and my other sons.

Q. Was that in the same house in which you had left him, when you left the village in CR 19 and

(Testimony of Lew Wah Fook.)

also when you left the village in CR 22? Withdraw that.

Was that in the same house you left your son in when you returned from your first trip and when you returned from your second trip?

A. The same house.

Q. When did you next see Lew Mon Soong?

A. When he came to the United States, 1951, when he arrived [22] in the United States.

Q. Did you recognize the Lew Mon Soong that came into court with you as the same person that you saw when he came to the United States in 1951, as the Lew Mon Soong you saw in 1946, in the village? A. Yes.

Q. And the boy you saw and knew as Lew Mon Soong in 1946, did you recognize him as the boy that you left in the village on your return on your second trip who was then six years old?

A. Yes.

Q. How old was Lew Mon Hing when you returned to the United States on your second trip?

A. About three years old.

Q. By Chinese count? A. Yes.

The Court: Mr. Brennan, I have a matter with the District Attorney's office, so we will recess this case until 3:15.

(Other court matters were taken up.)

The Court: You may proceed.

Q. (By Mr. Brennan): How old was Lew Mon Hing when you returned on your second trip?

(Testimony of Lew Wah Fook.)

A. About three. [23]

Q. When did you next see him?

A. CR 35, first month, approximately 15th day.

Q. Was that the same time you saw your oldest son, that you have earlier testified to?

A. Yes, the same.

Q. That was during your 90-day leave when you were in the United States Army?

A. Yes, same time.

Q. Where were you stationed when you were granted that 90-day leave? A. In Shanghai.

Q. How long were you in the Army overseas? Withdraw that. How long were you in the Army?

A. I went in the Army in July, 1943, and I left—I was discharged April, 1947.

The Court: How old was this No. 2, when you saw him in the village in 1946?

The Witness: Approximately 14.

Q. (By Mr. Brennan): Was he living in the same house with your oldest son?

A. Yes, the same.

Q. Is that the same house where you left him when he was three years old? A. Same. [24]

Q. When did you next see your second son?

A. 1951, when he arrived in Los Angeles.

Q. Did you recognize him as the same boy you saw in China in February, 1936, in the village?

A. Yes, I recognized him.

Q. Did you recognize him as the same boy you saw at three years of age, when you left the village

(Testimony of Lew Wah Fook.)

on the return to the United States on your second trip? A. Yes.

Q. When did you first see your son Lew Suey Yet?

A. CR 35, first month, approximately the 15th day.

Q. Was that on the same trip when you were in the United States Army on your 90-day leave?

A. Yes.

Q. Was he living in the same house where your two older sons were living, that you testified to?

A. Yes, all the same.

Q. How old was he when you saw him on that occasion? A. Approximately 10.

Q. When did you next see him?

A. In 1951, when he arrived in the United States.

Q. That was the same time you saw your two older boys, is that correct?

A. Yes, all the same.

Q. They all three arrived at the same time at the same [25] time, at the same port of entry, did they? A. Yes, the same.

The Court: May I ask a question?

Mr. Brennan: Yes, your Honor.

The Court: All these three boys arrived in this country at the same time?

Mr. Brennan: Yes.

The Court: Evidently there was a hearing. Did the government admit the No. 1 and the No. 2 boys?

Mr. Brennan: Yes.

(Testimony of Lew Wah Fook.)

The Court: And they turned the No. 3, down?

Mr. Brennan: That is correct.

The Court: All right.

Q. (By Mr. Brennan): Did you recognize the boy you saw in 1951, Lew Suey Yet, you have identified as your son, as the same boy you saw at age 12, in 1946, in the village? A. The same.

The Court: Has this witness got a certificate of identity; I wonder if I could look at it.

The Witness: Yes.

Mr. Brennan: May that be marked for identification, your Honor, as long as you are looking at it?

The Court: I wanted to compare the picture on the certificate of identity with the picture of the plaintiff and see [26] whether or not there was any family resemblance. Ask the plaintiff to turn his head this way.

Do you want this marked?

Mr. Brennan: Yes, as long as your Honor has looked at it, and we will substitute a photostatic copy.

The Court: It may be marked Plaintiff's Exhibit No. 3.

The Clerk: In evidence, your Honor?

The Court: No, for identification.

The Clerk: So marked, Plaintiff's Exhibit 3 for identification.

(The document referred to was marked Plaintiff's Exhibit No. 3 for identification.)

Mr. Brennan: Cross-examine.

Mr. Talan: Your Honor, we wish to reserve our cross-examination of this witness.

The Court: All right. You may step down.

Mr. Brennan: Now, will you call in the oldest boy. [27]

LEW MON SOON

called as a witness by and on behalf of the plaintiff, having been first duly sworn, was examined and testified, through the interpreter, as follows:

The Clerk: Your name, please?

The Witness: Lew Mon Soon.

The Interpreter: L-e-w M-o-n S-o-o-n.

Mr. Brennan: Can that also be S-o-o-n-g?

The Interpreter: Yes.

Direct Examination

By Mr. Brennan:

Q. Where were you born? A. In China.

Q. And when?

A. CR 19, 9th month, 19th day.

The Interpreter: November 19, 1930.

Q. (By Mr. Brennan): Where in China were you born? A. Lung Uck Lee.

Q. When did you come to the United States?

A. What date, do you mean? The date I left from China?

Q. What date did you arrive in the United States? A. May 27, 1951. [28]

(Testimony of Lew Mon Soon.)

Q. From what Chinese port or port in the Orient did you leave? A. In Hong Kong.

Q. How long were you in Hong Kong before you left for the United States?

A. A little over a year.

Q. Did you go to Hong Kong from the village at the time—withdraw that. When you first went to Hong Kong about a year before you left for the United States, did you go direct from the village?

A. Yes.

Q. Up to the time that you left the village for Hong Kong on this occasion, did you live in the village from the date of your birth until you left for Hong Kong? A. Yes.

Q. Who went to Hong Kong with you?

A. My brothers went with me, my No. 1 brother below me and my No. 2 brother below me.

Q. That would be Lew Mon Hing and Lew Suey Yet? A. Yes.

Q. Did they stay with you in Hong Kong until you left for the United States? A. Yes.

The Court: Did you live in the same house or room?

The Witness: In a store. [29]

The Court: Did any of you work while you were in Hong Kong?

The Witness: We all slept there. We didn't work in the store.

The Court: Did you work anywhere?

The Witness: No, we didn't work in Hong Kong.

(Testimony of Lew Mon Soon.)

The Court: All right.

Q. (By Mr. Brennan): Who is your father?

A. Lew Wah Fook.

Q. Did you come into court with him today and was he the one who went into the witness room just as you came into court now?

A. Yes, that is my father.

Q. Who is your mother?

A. Huie Shee Yee.

Q. Is your mother living?

A. My mother passed away.

Q. Up until the time she died, did you and your brothers, Lew Mon Hing and Lew Suey Yet, live together?

A. Yes, before she passed away.

The Court: When did your mother die?

The Witness: CR 35.

The Court: Was she living in the home in the village, when she died? [30]

The Witness: Yes, in the village.

The Court: Were you living in the same house?

The Witness: Same house.

The Court: Were your two brothers living in the same house?

The Witness: Yes, same house.

The Court: What did your mother die of?

The Witness: Dysentery.

The Court: All right.

Q. (By Mr. Brennan): Where is your brother, Lew Mon Hing?

A. He is in the United States.

(Testimony of Lew Mon Soon.)

Q. Is he the one that was in the witness room with you and whom you just left a few moments ago to come in to testify? A. Yes.

Q. Where is your brother Lew Suey Yet?

A. Here in the United States.

Q. Is this the boy that I have asked to stand up, sitting at my left at counsel table, is that your brother Lew Suey Yet? A. Yes.

The Court: How old were you when he was born?

The Witness: Approximately five or six.

The Court: Do you remember his birth? [31]

The Witness: I was too small to appreciate any of the goings on.

The Court: How old were you when you first could remember your brother?

The Witness: Ever since he was a child.

The Court: How old were you?

The Witness: When I was seven or eight. It was mandatory for me to look after him and to take care of him, and I remember I played with him, and ever since we grew up together.

The Court: You lived in the same house with him from the time he was born until you went down to Hong Kong?

The Witness: Yes.

Q. (By Mr. Brennan): Do you remember seeing Lew Wah Fook, that you have referred to as your father in 1946, in the village? A. Yes.

Q. For approximately how long did he remain in the vilage upon that occasion?

A. Approximately three months.

(Testimony of Lew Mon Soon.)

Q. Is that the same person that you have identified here as being your father?

A. Same one. He is my father.

The Court: When you saw your father in the village in 1946, what kind of clothes did he have on?

The Witness: Soldier's uniform. [32]

The Court: Soldier's uniform?

The Witness: Yes, soldier's uniform.

The Court: What soldier's uniform?

The Witness: It is army garments, that's all I know.

The Court: What army?

The Witness: United States Army.

The Court: How old were you then?

The Witness: About 16 or 17.

The Court: Did he have a gun?

The Witness: I didn't see any.

The Court: What kind of hat did he have?

The Witness: I saw it was a hat that he wore, but I couldn't describe it.

The Court: Was it a tin hat?

The Witness: Cloth. It was made out of cloth.

The Court: What color was it?

The Witness: Brown, khaki like.

The Court: Did your father wear a coat?

The Witness: I don't remember recalling an overcoat, but a coat, I remember.

The Court: What kind of a blouse did he have on?

The Witness: Medium size coat.

The Court: Did he have any marks on the coat, on the arms of the coat?

(Testimony of Lew Mon Soon.)

The Witness: It had an insignia. Just what type insignia [33] it is, I don't know.

The Court: Was your father an officer?

The Witness: I don't know whether he was an officer or not.

The Court: Didn't he tell you what he was?

The Witness: He never told me.

The Court: All right.

Mr. Brennan: Cross-examine.

Cross-Examination

By Mr. Talan:

Q. Do you remember the man who is alleged to be your father when he was in China on his second trip some time beginning with CR 21?

A. CR 21, at that time I was a child. I don't recall.

Q. When was it you saw the man who is alleged to be your father in China?

A. I remember seeing him when I was a child.

Q. How old were you then when you first remember seeing him?

A. I was perhaps four. Just when exactly, I don't know.

Q. What was the occasion when you first remember seeing him, at the time you were about four? [34]

A. I don't remember.

Q. When is the next time you remember seeing the man who is pointed out to you as your father?

A. The exact second time I can't remember. It is so long time ago.

(Testimony of Lew Mon Soon.)

Q. When is the most recent time you saw him in China?

A. The time before he came back in his army uniform, I remember.

Q. Do you remember when that was, the time before he came back in his army uniform?

A. The exact date, I don't know, I don't recall, but I remember I see him once before he came back with his army uniform.

Q. Was this about when you were, age four?

A. By age four, I meant my approximate age four. Exactly how old, I don't know.

Q. Was that time the time before he came back in uniform?

A. Yes, twice.

Q. Did you recognize your father when he came back in CR 35?

A. Yes, I remember.

Q. The last time prior to that time you were about age four, approximately, but you recognized him when he returned in CR 25? [35]

A. When he came back in CR 35, then I saw him again.

Q. Did you recognize him when he came back in CR 35?

A. Not too well.

Q. Then how did you know he was your father?

A. My grandmother told me.

Q. When he came back in CR 35, was he wearing a uniform?

A. Yes, army uniform.

Q. Had you ever seen a uniform like that before his return in CR 35?

A. There were some other soldiers passing by

(Testimony of Lew Mon Soon.)

the village before and I saw them. When my father came back with the same type uniform, I assumed it was an army uniform. I can't say truthfully whether they were before or not.

Q. How do you know which army uniform that was?

A. My father came to the United States and naturally he will be in the United States Army.

Q. When you lived in the village, Lung Ock, did you go to school? A. Yes.

Q. And where did you go to school while you were living in the village?

A. Li Ow Jung Slim.

Q. Where is this school located?

A. Near to our village. [36]

Q. About how far?

A. Little over 10 jungs.

Mr. Talan: Can that be translated in some type of English measurement?

The Interpreter: 10 Chinese feet equivalent to one jung.

The Court: This is approximately 100 Chinese feet from the village?

The Witness: I can't tell for sure.

The Court: You told us the other day a Chinese jung is about 1-1/2 in American feet.

The Interpreter: That's right.

The Court: So this would be 150 feet from the village?

The Interpreter: American count, yes, roughly.

(Testimony of Lew Mon Soon.)

Q. (By Mr. Talan): How long did you go to this school? A. Six years.

Q. Did you go to any other school in addition to this school? A. A went to another one.

Q. Which one was that?

A. Toy Chung School.

Q. Where is this school located with reference to the village of Lung Ock?

A. It is in Toy Shan Province, or the market place.

Q. How far away was that from the [37] village? A. About 20 odd lis.

The Court: And how much is a li?

The Witness: I don't know.

Mr. Brennan: I think the interpreter can probably give that to us. I think it is one-third of a mile.

The Court: Is a li a third of a mile?

The Interpreter: Close to it, approximately.

Q. (By Mr. Talan): Did you go to any other schools while you were in China?

A. Two schools.

Q. And these are the two that you have named, is that correct? A. They are the only two.

Q. And how long did you go to the second school? A. Little over three years.

Q. All together you went to school nine years in China? A. Little over nine years.

Q. The last school you attended was a school in Toy Shan? A. Yes, the latest one.

(Testimony of Lew Mon Soon.)

Q. When did you leave that school in Toy Shan, about how old were you at that time?

A. I was approximately 19 years old when I completed [38] Toy Shan Chung School.

Q. Do you recall what year it was you completed that attendance at that school in Toy Shan?

A. CR 37.

The Court: How old were you when you first started school?

The Witness: I remember about eight years old.

The Court: Was there any time between the time you left the first school to the time you started in the second school?

The Witness: There was a period when I wasn't going to school.

The Court: How long?

The Witness: Approximately two years.

The Court: Why did you quit school for two years?

The Witness: During the Japanese war.

Q. (By Mr. Talan): While you were attending this first school, this Li Ow Jung Slim School, were you living at home in the village?

A. Yes, at my home.

Q. When you began your attendance at the school at Toy Shan, were you still living at home in the village;

A. I was living in the school, the Toy Shan Chung School.

Q. Did you get home at all while you were away

(Testimony of Lew Mon Soon.)

at school? [39] A. I come home.

Q. How frequently would you come home while you were away at school?

A. I have no set pattern or schedule. I just come home and visit when I finish my school work.

Q. Would you go home several times a week, while you were away at school?

A. I don't come home every week.

Q. In 1946, were you attending school in Toy Shan?

A. Yes, I was in Toy Shan, going to school.

Q. Were you in Toy Shan in February, 1946?

A. That was vacation period in February.

Q. When did that vacation period begin?

A. There are two semesters in our school. This was the winter semester. It was too cold to stay in school, so we stayed off about over a month. It began some time in December of the previous year.

Q. That vacation lasted only a month?

A. Anywhere from one month to two months, no set pattern.

Q. Do you recall how long that particular vacation lasted?

A. No, I don't remember. It has been so long ago.

Q. Was it while you were on that vacation that you saw your father? [40]

A. It just so happened I was home on vacation and between semesters.

Q. Did you go back to school in Toy Shan while

(Testimony of Lew Mon Soon.)

your father was in the village on that last visit of his?

A. School started and I went back to school. My father was still in the village at home.

Q. Did you come back from Toy Shan while your father was still in the village on that last visit?

A. Since my father was home, I made special occasion to come back whenever I can, and especially seeing he was home, it was easy for me to get my tuition from him.

Q. Do you know how long your father stayed at home in the village on that last visit?

A. Approximately three months.

Q. What was the period that you were away from the village while you were attending school in Toy Shan?

A. CR 34 to 37, to the end of 37.

Q. Did you come back to live in the village before you left the village for Hong Kong?

A. Yes. I left the school. I went back to the village and I stayed in the village for a while before I went to Hong Kong.

Q. How long were you in the village before you left for Hong Kong?

A. A few months. [41]

Q. Up to the time you returned to the village for those few months before leaving for Hong Kong, you were away at Toy Shan attending school there, is that right?

A. Yes,

Q. You had been attending school away from home, attending the school in Toy Shan since about CR 34, is that right?

A. 34 to 37, that is about approximately.

(Testimony of Lew Mon Soon.)

Mr. Talan: No further questions of this witness.

Mr. Brennan: I have no further questions, your Honor.

The Court: We will now recess until 10:00 o'clock tomorrow morning.

(Thereupon, an adjournment was taken to 10:00 o'clock a.m., April 22, 1953.) [42]

April 22, 1953, 10:00 A.M.

The Clerk: Lew Wah Fook vs. Dulles.

Mr. Brennan: Ready.

Mr. Talan: Ready, your Honor.

The Court: You may call your next witness.

Mr. Brennan: Call Lew Mon Hing.

LEW MON HING

called as a witness by and on behalf of the plaintiff, having been first duly sworn, was examined and testified, through the interpreter, as follows.

The Clerk: Will you state your name, please?

The Witness: Lew Mon Hing.

Mr. Bennan: Your Honor, I am wondering at this time if we can enter into the record as a stipulation the statement I made the other day to which there appeared to be no disagreement, that Lew Mon Soong, who testified yesterday, and Lew Mon Hing, who is now on the stand, have been admitted to the United States as American citizens through derivative citizenship of their father, Lew Wah Fook.

(Testimony of Lew Mon Hing.)

Mr. Talan: We concede that, your Honor.

The Court: And can you stipulate as to when they were admitted?

Mr. Brennan: Yes. [44]

The Court: Approximately when?

Mr. Brennan: The date that the determination was made was July 1, 1952. Whether it was made effective immediately or not, I don't know, but the determination was made. Is that your stipulation?

Mr. Talan: Yes, your Honor, we will stipulate to that.

Mr. Brennan: July 1, 1952.

Direct Examination

By Mr. Brennan:

Q. Where were you born? A. In China.

Q. What village? A. Lung Ock Village.

Q. Who was your father?

A. Wah Fook.

Q. Who was your mother?

A. Huie Shee.

Q. When were you born?

A. CR 22, 12th month, 5th day.

Q. Do you have an older brother?

A. Yes.

Q. What is his name?

A. Lew Mon Soong.

Q. Is he the one that testified yesterday and exchanged [45] places with you in the witness room this morning? A. Yes.

(Testimony of Lew Mon Hing.)

Q. Is the person you identified as your father the person that also is waiting in the witness room and testified in court yesterday, being Lew Wah Fook? A. Yes.

Q. That is the person you identified as your father in your testimony this morning, is that correct? A. Yes.

Q. Do you have a younger brother?

A. Yes.

Q. What is your next younger brother's name?

A. Lew Yet Tan.

Q. Do you have a brother older than that?

A. Yes.

Q. What is his name?

A. Lew Poy, born here in the United States.

Q. Is that a younger brother still?

A. The youngest.

Q. Now, is there a brother between you and Lew Mon Tan or Tang? A. Yes.

Q. What is his name? A. Lew Yut.

Q. Where is he now? [46] A. In China.

Q. Do you have any other brothers besides Lew Mon Soong in the United States?

A. Yes, my No. 3 brother, Thew Yet.

Q. Is he the brother sitting at my left at counsel table? A. Yes.

The Court: When was he born?

The Witness: CR 24, 8th month, 12th day.

The Court: While we are on that, did you say a moment ago that you were born CR 22-12-5?

The Witness: Yes.

(Testimony of Lew Mon Hing.)

The Court: Would you translate that? What is that?

Mr. Brennan: We had that translated yesterday, if your Honor would care for me to give it.

The Court: Let's get it here now.

The Interpreter: January 19, 1934.

Mr. Brennan: Does your Honor have any other questions now?

The Court: This is the first case that I can recall where there seems to be a difference in dates. I am amazed sometimes at how well these people remember dates. They testify time after time and all of them testify right on the dot as far as dates. Here is a case where there seems to be some difficulty. This witness has just given 22-12-5. The [47] father gave 22-11-15.

Mr. Brennan: He subsequently corrected that to CR 22-12-5, your Honor.

The Court: The father has given not only a wrong date on this boy, but a wrong date on the other boy.

Mr. Brennan: Which he also corrected.

The Court: Which he has corrected here in court. All right. You proceed now.

Mr. Brennan: Those are the two boys that are conceded to be his sons, your Honor.

The Court: I know. This is the one that doesn't make any difference anyhow.

Mr. Brennan: On the plaintiff, there has been no conflict.

(Testimony of Lew Mon Hing.)

The Court: No, there has been no conflict as to the plaintiff yet.

Q. (By Mr. Brennan): Did you come to the United States with your brothers, Lew Mon Soong and Lew Suey Yet? A. Yes.

Q. And before you came to the United States, were you and your two brothers in Hong Kong for a period of time?

A. Yes. We stayed together in Hong Kong.

Q. Did you go to Hong Kong together, the three of you? A. Yes, together. [48]

Q. Did you go to Hong Kong together from the village where you and your two brothers were born?

A. Yes.

Q. From the birth of your brother, the plaintiff in this case, Lew Suey Yet, until you left for Hong Kong from the village to come to the United States, did you and that younger brother and your older brother live together in the same house in the village? A. Yes, the same house.

Q. Were you present and do you recall seeing your father in the village in February of 1946?

A. Yes.

Q. For how long a period of time was he in the village? A. A little over two months.

Q. Were your brothers, Lew Mon Soong and Lew Suey Yet, both in the village during that period of time when your father was there?

A. Yes.

Q. From the time of the birth of Lew Suey Yet until you left for Hong Kong, were you all part

(Testimony of Lew Mon Hing.)

of the same household and did you play together, would you be around the house and in the village together? A. Yes.

Mr. Brennan: Cross-examine, [49]

Cross-Examination

By Mr. Talan:

Q. From the time you can remember, where was your house in the village of Lung Ock?

A. I remember.

Q. Where was it located in the village?

A. West side.

The Court: May I ask a question?

Mr. Talan: Go ahead, your Honor.

The Court: Did this village have a head or a tail?

The Witness: Yes.

The Court: How many houses were in the village?

The Witness: 15.

The Court: Which way was the head of the village?

The Witness: Towards the east.

The Court: Were the houses divided into rows?

The Witness: Yes.

The Court: From the head of the village, that is, from the east side of the village, what row was your house in?

The Witness: The last row.

The Court: How many rows were in the village?

(Testimony of Lew Mon Hing.)

The Witness: Five.

The Court: Where was your house in the last row?

The Witness: The first one.

The Court: The first one from which direction, from north [50] or south?

The Witness: Towards the north.

The Court: It was the first house on the north side?

The Interpreter: Yes.

The Court: How many houses were in that row?

The Witness: Three.

The Court: All right. Now you can proceed.

Q. (By Mr. Talan): As long as you can remember, is that the house you always lived in when you were in the village? A. Yes.

Q. Can you tell us what the sleeping arrangements were in that house? A. Yes.

Q. Would you tell us what they were?

The Court: Just a minute. May I interrupt a minute?

Mr. Talan: Certainly.

The Court: How old were you when you left the village to go to Hong Kong?

The Witness: 19.

The Court: You had lived in this house from the day you were born until the day you left for Hong Kong?

The Witness: Except for the period of time when I went to school in Toy Shan.

The Court: Were you going to school in Toy

(Testimony of Lew Mon Hing.)

Shan immediately [51] before you went to Hong Kong?

The Witness: Yes. I went back to the village and stayed for a short while before I went to Hong Kong.

The Court: How long did you stay in the village before you went to Hong Kong?

The Witness: About a month and a half, two months, around there.

The Court: Now you better put your question as to time. We have got 19 years. The sleeping arrangements changed in the 19 years. Let's put it immediately before he left for Hong Kong and immediately before he went away to school.

Mr. Talan: All right, your Honor.

Q. What were the sleeping arrangements in this house you lived in in the village just before you left for school in Toy Shan?

A. My brother, Soong, and I lived in the same room and at times my fifth and sixth uncle is also in that room. It is the center room towards the house which we partitioned the rear part and used it as living quarters. My mother and Yet, Lew Suey Yet, stay with my mother, slept with my mother, and at times when my father is home, he slept there also. Then the room toward the east, my grandmother and occasionally my aunt slept together.

Q. Was this arrangement still in existence at the time you left the village for Hong Kong? [52]

A. Yes.

(Testimony of Lew Mon Hing.)

Q. Was there any time when you and your third brother slept in the same room?

A. No. He always slept with his mother.

Q. When did you leave the village to go to school in Toy Shan? A. CR 36.

Q. How long did you go to school in Toy Shan?

A. For two years.

Q. While you were going to school in Toy Shan, were you living in Toy Shan?

A. I was living in the school.

Mr. Talan: No further questions, your Honor.

Mr. Brennan: No questions. He may be returned to the witness room and I will call at this time Lew Shui Yet.

LEW SHUI YET

called as a witness by and in his own behalf, having been first duly sworn, was examined and testified, through the interpreter, as follows:

The Clerk: Your name, please?

The Witness: Lew Shui Yet. [53]

Direct Examination

By Mr. Brennan:

Q. Is it your claim that you are entitled to permanent residence and desire to be a permanent resident of Los Angeles County, being in the Southern District of California, Central Division, of this court? A. Yes.

Q. Who is your father?

A. Lew Wah Fook.

(Testimony of Lew Shui Yet.)

Q. Is that the person that has been in court with you and is now in the witness room adjacent to this court? A. Yes.

Q. Who is your mother?

A. Huie Shee Yee.

Q. In what village were you born?

A. Lung Ock Li.

Q. When were you born?

A. CR 24, 8th month, 12th day.

The Interpreter: September 9, 1935.

Q. (By Mr. Brennan): Did you come to the United States with two older brothers, Lew Mon Soong and Lew Mon Hing? A. Yes.

Q. Just before coming to the United States, were you in Hong Kong with them for a period of [54] time? A. Yes.

Q. Did you go to Hong Kong with them from the village? A. Yes.

Q. Before leaving the village for Hong Kong, where did you reside from the time of your birth?

A. As far as I can remember, I stayed in the village all the time.

The Court: When you went to Hong Kong, how old were you?

The Witness: About 15.

The Court: Then you were in the village from the time you were born until you were 15, is that right?

The Witness: Yes.

Q. (By Mr. Brennan): During that period of time did you live with your two brothers, Lew Mon

(Testimony of Lew Shui Yet.)

Soong and Lew Mon Hing, in the same house in the village? A. Yes.

Q. Did you see your father in February, 1946?

A. Yes.

Q. How old were you then? A. About 11.

Q. In what village did you see your father?

A. Lung Ock Li Village.

Q. For how long a period of time was he there?

A. Over two months. [55]

Q. Is that the same person you have identified as being your father, Lew Wah Fook?

A. Yes.

Q. And the two brothers that you identified as being the ones that you went to Hong Kong with and came to the United States with, are those the two boys that have been in court with you and are now in the witness room adjacent to this court?

A. The same.

Q. From the time of your birth, as you can remember that period—withdraw that.

From as far back as you can remember up until the time you left for Hong Kong with your two brothers, did you grow up in the village and play with them and live in a family unit with those two brothers that you have identified? A. Yes.

Mr. Brennan: Cross-examine.

Cross-Examination

By Mr. Talan:

Q. Were you living in the village of Lung Uck in 1946? A. Yes.

(Testimony of Lew Shui Yet.)

Q. Were you going to school at that time?

A. It was during vacation time.

Q. When was vacation time in 1946? [56]

A. From December of the preceding year to the second month of the 35th year, CR 35. They started on CR 34 to the second month in CR 35.

Q. When is the first time you remember seeing the man you have alleged to be your father?

A. That is the first time.

Q. When was that? A. CR 35.

Q. What part of CR 35?

A. The first month of CR 35.

Q. Where were you when you first saw this man?

A. I was at home.

Q. In your house at the village?

A. Yes, in the house.

Q. How did you know this man was your father?

A. My grandmother told me.

Q. While you were living in the village from the time you were born until you left for Hong Kong, were your two older brothers always in the village with you?

A. Sometimes they go to school.

Q. Were they both away at the same time?

A. The eldest one went to school in CR 34. The next to the eldest went CR 36.

The Court: What do you mean? He went away to school?

The Witness: Yes, went away to school. [57]

Q. (By Mr. Talan): When did your first brother leave school?

(Testimony of Lew Shui Yet.)

A. CR 34 to 37, he went to school.

Q. When did your second brother leave school?

A. CR 36 to CR 37.

Q. Have you always been called by your present name?

A. Ever since I was small that I can remember.

Q. Has any member of your family ever given you another name?

A. No one has ever given me a name, but I was subject to ridicule because of my name.

Mr. Talan: No further questions, your Honor.

Redirect Examination

By Mr. Brennan:

Q. You say you were subject to ridicule because of your name. Why is that?

A. Because all the other little children my age said my name is a girl's name.

Mr. Brennan: That's all.

Mr. Talan: No further questions, your Honor.

The Court: Step down.

(Witness excused.)

Mr. Brennan: That is the plaintiff's case, your Honor. [58]

Mr. Talan: May we have Lew Wah Fook recalled for cross-examination?

Mr. Brennan: That's right. I had forgotten about that. We will not rest until we determine what may develop on cross-examination. We have no other witnesses.

LEW WAH FOOK

a witness by and on behalf of the plaintiff, having been heretofore duly sworn, resumed the stand and testified, through the interpreter, further as follows:

The Clerk: Your name is Lew Wah Fook?

The Witness: Yes.

The Clerk: You have been sworn.

Cross-Examination

By Mr. Talan:

Q. Do you understand English?

A. Very little.

Q. Do you speak English?

A. Very little.

Q. When you first arrived in the United States from China in 1923, were you accompanied by anybody else? A. I was with my father.

Mr. Brennan: What was the date that you gave in the question? [59]

Mr. Talan: 1923.

Q. Where was your father living in that year? In China or in the United States? Withdraw the question. Did he come with you at that time from China? A. He was with me on the same boat.

Q. Where was his residence in the United States at that time?

A. 863 Stockton Street, San Francisco.

Q. After you were admitted to the United States in 1923, did you go to live with your father in San Francisco?

(Testimony of Lew Wah Fook.)

A. I stayed in San Francisco.

Q. How long did you stay in San Francisco?

A. Up until the time I made my trip back to China in 1929.

Q. After you returned from that first trip to China in 1931 where did you take up residence in the United States then?

A. I returned to San Francisco and stayed at the same address in San Francisco.

The Court: With your father?

The Witness: Yes, with my father.

Q. (By Mr. Talan): And how long did you stay at that address?

A. To 1932, when I returned to China.

Q. After you returned from that second trip to China in 1935, where did you then take up residence in the United States? [60]

A. Same address in San Francisco.

The Court: With your father?

The Witness: Yes, with my father.

Q. (By Mr. Talan): When did you leave that address? A. 1936.

Q. Was your father still at that address when you left it in 1936?

A. My father was still there.

Q. Where did you go after you left that address? A. I came to Los Angeles.

Q. Where did you take up residence in Los Angeles? A. 928 South Western.

Q. While you were living at that address in Los

(Testimony of Lew Wah Fook.)

Angeles and your father was still in San Francisco, did you correspond with one another?

A. Very seldom. I may write to him, but he never answer because he doesn't know how to write letters.

Q. Did he ever have anybody write for him?

A. Prior to his trip to China, he wrote me a letter. I don't know whether he wrote it or someone else wrote it for him.

Q. When was his trip to China that you just mentioned?

A. It was some time in 1936.

Q. While he was over in China on that trip, did you [61] ever hear from him?

A. He wrote me one letter I can remember. That was at Hong Kong, where he asked someone else to write for him, telling me that he arrived safely.

Q. Can you recall what year that letter was written for your father?

A. I deduce it as 1936 inasmuch as he left in 1936. I don't recall that distinctly.

Q. Did he say in that letter whether or not he had reached the village?

A. The letter only stipulated that he arrived in Hong Kong.

Q. Did your father ever return to the United States from that trip?

A. No.

Q. Is he still living?

A. No. He is dead.

Q. When did he die?

A. 1943.

Q. From 1936 to 1943, you never heard from him while you were here in the United States?

A. Being that he is the head of the family, they

(Testimony of Lew Wah Fook.)

use his name in the letters, but the letter was not written by him, but they were family letters informing me of what is the condition back in [62] China.

Q. Your father's name was signed to those letters?

A. The other family wrote his name, but they respected him that much because he was the head of the family.

Q. How many times did you get such letters with his name on them?

A. About three or four times.

Q. Between 1936 and 1943?

A. Yes, because during the time of 1936 all China was engaged in a war with Japan and letters were very infrequent.

Q. Can you recall the date of the last letter you received with your father's name on it?

A. Approximately 1940.

Q. After you came to the United States, how many trips did you make away from the United States?

A. I made two trips on my own.

Q. Were those two trips to China?

A. Yes.

Q. Did you ever make a trip away from the United States to any other place?

A. No.

Q. Did you ever contemplate such a trip?

A. I may have thought of it but I never actually went to any other country.

Q. Did you ever initiate any action with respect to any trip away from this country other than the

(Testimony of Lew Wah Fook.)

two trips you [63] made to China? A. Yes.

Q. When was this? A. 1943.

Q. Where were you about to go in 1943?

A. To Alaska to work.

Mr. Talan: May I have this document marked for identification?

The Court: It may be marked Defendant's Exhibit A.

The Clerk: So marked.

(The document referred to was marked as Defendant's Exhibit A for identification.)

Mr. Talan: That is a copy, your Honor, and if there is no objection, we will use the copy.

Mr. Brennan: No objection to the use of the copy and it may be received in evidence as far as I am concerned.

Mr. Talan: I won't offer it at this time.

Q. I will refer you to Defendant's Exhibit A for identification and ask you if that is your signature in English in the space designated as Applicant's signature?

A. Yes, that is my signature.

Q. I refer you to the same exhibit, the same portion of that exhibit, and ask you if that is your signature in Chinese which appears to the right of your signature in English? A. Yes. [64]

Q. Do you remember furnishing the officer in the Immigration and Naturalization Service with the information that appears on this Exhibit A, Defendant's Exhibit A for identification?

(Testimony of Lew Wah Fook.)

A. I remember now.

Q. Do you recall whether or not those statements you made in connection with that form were given under oath?

A. I don't remember whether it was under oath or not.

Q. Do you remember giving this information, which appears in this Defendant's Exhibit A:

"Class—Son of native.

"Date—4/21/43.

"Sworn—Yes."

Mr. Brennan: We will stipulate he gave all of the information as shown on the document.

The Witness: This is not my handwriting.

Q. (By Mr. Talan): Is any of this in your handwriting? A. Only my name.

Q. Do you remember giving this information in connection with this item:

"Describe all your children: 2 sons and 1 daughter."

Did you give that information at that time?

A. I remember giving that information. [65]

The Court: What was that?

The Witness: I remember giving that information.

Q. (By Mr. Talan): Under "Name" you showed first Lew Mon Hing; sex, male; age, 11; birth date, CR 22-12-5, Lung Ock Village, China."

Was that information supplied by you at that time? A. Yes.

(Testimony of Lew Wah Fook.)

Q. Then under "Name," the name Lew Mon Thung; sex, male; age, 14; CR 19-9-19, Lung Ock Village, China; did you supply that information at that time? A. Yes.

Q. Then under that "Name," the name Lew Siu Ngoot; sex, female; age, 9; CR 24-8-12, Lung Ock Village. Did you give that information at that time?

A. Yes.

Q. Do you remember being asked about the form which is Defendant's Exhibit A for identification at the time of the primary examination in connection with the application of your boys on or about June 7, 1951, at San Pedro, California?

A. They asked me that.

Q. Can you recall what answers you gave in connection with the questions about this form that were asked of you at that examination?

A. I told them I didn't remember that application. In [66] the beginning, I didn't remember. Then when they showed me the document, then I recall.

Q. Did you say at that time that you had never claimed you had a daughter?

A. I told them I didn't have any daughters.

Q. The question is, did you tell them at that time that you had never claimed that you had a daughter? A. I claim I had a daughter.

The Court: You claim you had a daughter?

Mr. Brennan: Claimed, I think he said.

The Court: Is it claimed?

The Interpreter: Claimed, e-d.

(Testimony of Lew Wah Fook.)

The Court: Before you proceed with the cross-examination, we'd better take our morning recess. We will now recess until 10 minutes after 11:00.

(Recess.)

Mr. Talan: May I have this document marked for identification?

The Court: It may be marked Defendant's Exhibit B for identification.

The Clerk: So marked, B for identification.

(The document referred to was marked as Defendant's Exhibit B for identification.)

Q. (By Mr. Talan): I refer you to page 42 of Exhibit 1. [67]

The Court: Exhibit 1?

Mr. Talan: It is referred to as that. This is the transcript of the primary examination.

The Court: It is Exhibit B.

Mr. Brennan: It is Exhibit 1 attached to Exhibit B, is it?

Mr. Talan: That's right.

Q. Referring to page 42 of Exhibit 1 attached to Defendant's Exhibit B for identification, I ask you whether or not you gave the following answer to this question:

"On this form under 'Describe all your children,' it says two sons and one daughter, and it gives the third child, Lew Siu Ngoot, born CR 24-12- as female. How do you explain that?

"A. I don't know how that come in, I couldn't

(Testimony of Lew Wah Fook.)

explain to you. I never was claiming a daughter, I never had one before."

Did you make that answer?

A. I did make that statement. However, I want to explain that when I said I never claimed a daughter, I did claim a daughter, but I never claimed a daughter to the immigration office, that is what I meant.

The Court: You say you claim a daughter? What daughter do you claim? [68]

The Witness: I thought Lew Thew Yet was a daughter.

The Court: This is the party you were referring to?

The Witness: Yes. I thought he was a girl.

The Court: You mean to say that when this boy was born or when the child was born, you thought a girl was born, is that right?

The Witness: Yes, that's right.

The Court: When did you find out it wasn't a girl?

The Witness: When I was in the Army and I had my leave and went back to the village, I found out it was a boy.

The Court: That is the first time you found out this is a boy?

The Witness: That is my first time.

The Court: Who names Chinese children?

The Witness: The head of the family. In my case, it was my mother.

The Court: Didn't your mother or your wife ever

(Testimony of Lew Wah Fook.)

write you after the birth of this child what the name of the child was?

The Witness: I received correspondence saying that my wife gave birth to a child and gave me the name and date of birth, and it was born and it was well, but I just assumed, it was a girl's name, I just assumed it was a daughter. It didn't mention specifically whether it was a boy or a girl, but it was a girl's name, so I deduced it was a girl. [69]

The Court: Nobody ever wrote you it was a boy?

The Witness: No, I was never informed of that.

The Court: Don't you think it is very strange a girl's name was given to a boy?

The Witness: This was an unusual case, yes.

The Court: May I ask the interpreter a question?

The Interpreter: Yes.

The Court: Have you ever heard in China where a girl's name was given to a boy?

The Interpreter: Yes, it has happened before. There is some sort of superstition. In fact, when I was a child, I had to have my Chinese name changed once because when I was a child I was very sickly and they felt the name had something to do with it, and it didn't suit my nature.

The Court: They didn't give you a girl's name?

The Interpreter: My second name could be interpreted that way.

The Court: There is no question this is a girl's name?

(Testimony of Lew Wah Fook.)

The Interpreter: Mine is questionable, but this is strictly a girl's name. The second name means pretty and a boy would never be called pretty. A girl's name flows into three or four situations, where they are after something, pretty or esthetic or after a flower or after something that is very delicate. A boy's name would be something strong, something ferocious, like some sort of an animal or something [70] hard, like rock or steel. Chiang Kai Shek's name is rock.

The Court: It would seem to me mighty strange, considering the attitude of the Chinese relative to the difference between a boy and a girl, the male and the female, that they are always celebrating the birth of a boy. I don't know what they do with the girls. The girls in the Chinese race would be exterminated in three or four generations if the ratio we have in these cases applies. We don't have any girls at all.

The Interpreter: There is a time when you do have a girl and they don't mention it. The son they are very proud of. It is some sort of primogeniture.

The Court: It would take a lot of explanation as to why this was done, considering the fact that in China the sons are always the ones that are wanted, they are the ones that carry on the race, so it would take a lot of explanation as to why anybody would name a boy as a girl. It is pretty near inconceivable.

The Interpreter: It is very unusual.

The Court: Ask the witness this: You claim you

(Testimony of Lew Wah Fook.)

didn't know this child was a boy until you went back to the village when you were in the Army in 1946 or 1947.

Mr. Brennan: 1946.

The Court: Yes, 1946.

The Witness: It was in 1946 that I first found out it was a boy instead of a girl. Naturally, I was very joyous of [71] the fact and I demanded an explanation. The explanation was that my mother, who was a highly superstitious woman, at the time when the child was born, she went to this idol that they have and through this process of the idol, they shook these little bamboo sticks that have characters in them, and in that way she can get the name for the boy. The name came out from the bamboo sticks stating that it is a girl's name, and the explanation said that if this child was born and was born a boy, with a boy's name, the child would not live long, so it must be a girl. So subsequently when the child was born and they found out it was a boy, my mother sought to offset the spirits by giving the boy a girl's name, and instructed all the rest of the family not to tell me it was a boy, but to inform me, if they ever had the chance to write to me, to either keep quiet about it or tell me it was a girl.

The Court: When did you get this information? When did you find out this information?

The Witness: When I went back to China in 1946 and I saw my child, and by his features I knew it was a boy. I demanded an explanation. It

(Testimony of Lew Wah Fook.)

was at that time that they told me what went on. Right away I was denied of a joyous celebration because it was a boy, and at that very moment when I found out, I wanted to make a ceremony and change the name to a boy's name, but my mother would not let me do so, stating the boy would have to reach the age of 18 before such a process [72] can be undertaken; otherwise, his health would be in jeopardy.

The Court: All right.

Q. (By Mr. Talan): I refer you to Plaintiff's Exhibit 2 in evidence and ask you whether the child you claimed as a daughter is the child that resulted from the pregnancy that you reported to the Immigration Service at that time, which was July 31, 1935? A. Yes.

Q. At that time did you report your wife was pregnant seven months?

A. I don't remember how many months but I remember I did report she was pregnant.

Q. How soon after you returned to the United States from that trip did you learn of the birth of the child that resulted from that pregnancy?

A. It was approximately 1935 in the tenth month, according to Chinese reckoning, that I received a letter stating that a child was born.

Mr. Talan: Will you translate that?

The Interpreter: The last five days of October and the month of November.

The Court: What year?

The Witness: 1935.

(Testimony of Lew Wah Fook.)

The Court: How did you get this word? [73]

The Interpreter: What word is that?

The Court: Relative to October or November?

The Witness: I came back on July, 1935, and it was about two or three months thereafter that I received a letter, so I am approximating.

The Court: Received a letter from whom?

The Witness: My mother.

The Court: This letter just said a child was born, didn't say it was a boy or a girl?

The Witness: It didn't say whether boy or girl, but it had a girl's name.

The Court: You haven't got a copy of that letter, have you?

The Witness: I lost, destroyed or have given away all my things prior to the time I went into the service so I don't have a copy.

Q. (By Mr. Talan): This child that was born in 1935, is this the child that was named Lew Shew Yet? A. Yes.

Q. After the birth of this child, did you ever have any correspondence with your wife in China?

A. Yes.

Q. How frequently did you correspond with your wife?

A. About two or three times each year. [74]

Q. You corresponded with your wife two or three times each year from 1935 until 1943?

A. The first few years when I returned after 1935, I received quite a few letters, but since that

(Testimony of Lew Wah Fook.)

time from about '37 on, when China was at war with Japan, the letters came very infrequently.

Q. Can you remember how many letters you received between 1935 and 1937?

A. About five or six.

Q. In any of those letters was any reference made to the sex of your third child?

A. She never mentioned the sex. The letters that was written that was from her were written by someone else in the market place where you have to pay for letter writers.

Q. In your correspondence at that time to her, did you ever refer to the sex of the child?

A. I don't recall specifying the sex of the child, but I recall that I asked each and every member how are they doing.

Q. When did you enter the armed forces of the United States? A. 1943.

Q. When in 1943?

A. July, about the 15th.

Q. At the time you entered into the armed forces of the [75] United States, did you make any claims for dependents? A. Yes.

Q. And whom did you claim as your dependents at that time?

A. I claimed one wife, two sons and one daughter.

Q. Did you ever change that claim of dependency while you were in the armed forces?

A. I never changed it.

Q. Did you ever make any claims for depend-

(Testimony of Lew Wah Fook.)

ents on income tax returns? A. Yes.

Q. Do you remember the last year when you made any such claim prior to 1943?

A. I believe I did.

Q. Whom did you claim as your dependents on those income tax returns?

A. My wife, my two sons, and one daughter.

Q. When you returned to the village in China on your furlough from the armed forces in 1946, what were the circumstances under which you learned your third child was a boy, rather than a girl?

A. When I went into the home and my three sons came forth, I was astonished, because I had three sons. I thought the youngest one was a daughter.

Q. Weren't you curious as to why three sons came forward? [76]

A. For over a period of 10 years I thought I had a daughter, and at that moment I found out I had another son. I was joyous. But at the same time I was curious because I wondered why no one ever told me, and I was astonished and happy at the same time.

Q. Did you ask where your daughter was when you first arrived home in the village?

A. I didn't ask because my son was introduced to me as my son with a name I had known my daughter to be, so I assumed there was no other person.

Q. What is the explanation that was given to

(Testimony of Lew Wah Fook.)

you at that time for the fact that the third boy in that house bore the name that was given to him?

A. Prior to the actual birth, my wife was expecting any day, and my mother went to this temple and shook these bamboo sticks. The sticks that fell from this disclosed that I was not due to have a son during that year, that if I do have, give birth to a son, that is my wife give birth to a son, that person will not live. So in order to offset that, in the event you do have a son, you have to give it a girl's name and you have to train it as if it was a girl until it is 18 years old, and at that time you can change the name and treat it as a boy from there on, but before that you have to treat it as a girl. [77]

Q. Prior to your return to the village in 1946, you never received such an explanation in your correspondence with your family in China?

A. They never informed me, because I don't believe in the Chinese religion or spirits. I am a Christian. I assume if they told me, I would naturally refuse to carry out such an antiquated custom. I would make sure there would be a celebration because it was a boy. Also, I would give it a boy's name if I had known about it.

Q. Did anybody in your family consult a fortune teller with respect to the naming of this child?

A. Yes. There was a fortune teller that my mother consulted after she went through this procedure at the temple, and the fortune teller also told her the same thing, that if it was a son, it would not

(Testimony of Lew Wah Fook.)

live long, that we have to give it a girl's name and raise it as if it is a girl.

Q. When is the last time you had any communication with your family prior to your entering into the armed forces of the United States?

A. 1941.

Q. Who was it that wrote to you in 1941?

A. It was through my father's name.

Q. Did you ever receive any letters from your older sons prior to 1943? A. No. [78]

Q. How often did you send money to your family after you returned from your trip in 1935 until you left with the armed forces?

A. On my return to the United States in 1935, I was unemployed. During the whole year of 1935 I did not send any money back to the family.

In 1936, I found employment and I sent money back twice. Thereafter I tried to make it a point to send money back two or three times a year.

Q. On each of the occasions when you sent money back to your family in China, did you write a letter to them?

A. In 1936, when I sent money back, I always accompanied any money I did send back with a letter, but after 1937, when there is a Japanese war in progress in China, I cabled the money back because that is the only method that is assured with any security. I cabled it back to a store. I did not accompany it with any letter. The reason I did that was that the people in the village was moving back and forth because the Japanese were going through

(Testimony of Lew Wah Fook.)

each village and they were in hiding, so the only thing I can do is cable to a specified store and they will come to the store and ask at different intervals if any money is sent over from the United States to them.

Q. The letters that you did write back to China after 1935, to whom were they addressed there? [79]

A. Before my father went back to China, my mother was the head of the family. I sent the money in her name. After my father went back to China, he became the head of the family and I sent money in his name.

Q. I am asking you about the letters you wrote, with or without name, to whom were they addressed in China?

A. These letters were very short. I addressed them the same way as if I cabled money. It is up to my mother, who is the head of the family.

Q. Did you ever send any clothing back to your family in China?

A. I never sent any clothing, no.

Q. Did you ever send any toys back to your children? A. No.

Q. In 1940, how many relatives did you have here in the United States?

A. Two older brothers and one younger brother here in the United States in 1940.

Q. Where did each of those brothers live in the United States?

A. One in Arkansas, one in North Dakota, and one in Arizona.

(Testimony of Lew Wah Fook.)

Q. Did you ever correspond with these brothers after 1935? A. No, I did not. [80]

Mr. Talan: Your Honor, I would like to offer Defendant's Exhibits A and B in evidence at this time.

The Court: They may be received in evidence.

The Clerk: So marked.

Mr. Brennan: I am going to object to the receipt of any portion of B except those portions of B with which counsel confronted this witness, on the grounds it is incompetent, irrelevant and immaterial.

The Court: I think the objection is good, so the order will be that way. The only parts admissible in evidence are the parts which counsel has called to the witness' attention.

(The exhibits referred to were received in evidence and marked Defendant's Exhibits A and B.)

The Court: How much more have you?

Mr. Talan: We have no other questions.

The Court: Does that complete your case?

Mr. Talan: Yes.

The Court: Have you any other witnesses?

Mr. Brennan: No other witnesses, and I believe we will not recall any other witnesses.

The Court: I am going to recess until after lunch. I am just wondering about it. It won't take more than an hour to complete, will it?

Mr. Brennan: I am sure not.

The Court: Then I will arrange to take care of some [81] other matters at 3:00 o'clock.

We will now recess until 2:00 o'clock this afternoon.

(Thereupon, a recess was taken to 2:00 [82] p.m.)

April 22, 1953—2:00 P.M.

(Other court matters were taken up.)

The Court: You may proceed now.

Mr. Brennan: At this time we introduce into evidence a photostatic copy of Plaintiff's Exhibit 3 for identification and ask leave to withdraw the original and return that to the witness, Lew Wah Fook.

The Court: Such may be the order.

The Clerk: It will be marked Plaintiff's Exhibit No. 3.

(The document referred to was received in evidence as Plaintiff's Exhibit No. 3.)

Mr. Brennan: I just want to ask the witness who has been on the stand to step over to counsel table and stand next to the plaintiff and I will ask the court to observe the two while they are standing together. Will you step over here, please, and will you stand up next to your father?

(Complying.)

The Court: All right.

Mr. Brennan: No further questions, your Honor.

The plaintiff rests.

Mr. Talan: We have no further questions of this witness and we have no other evidence. The defendant rests.

Mr. Brennan: I have just one or two brief observations to make. [83]

(Argument of counsel.)

The Court: I think the only thing I can do in this case is render judgment in favor of the defendant. The evidence just doesn't add up. It seems to me, knowing Chinese people and the store they put on boys, and the fact that girls are rather an insignificant quantity, the birth of a boy is a matter of celebration, that it is inconceivable a mother or a grandmother would keep the information from the father for a period of 11 years. If it was a couple of years, I could understand it, but after 11 years, it just doesn't add up.

Judgment is for the defendant.

We will stand in recess until 10:00 o'clock tomorrow morning. [84]

Certificate

I hereby certify that I am a duly appointed, qualified and acting official court reporter of the United States District Court for the Southern District of California.

I further certify that the foregoing is a true and correct transcript of the proceedings had in the above-entitled cause on the date or dates specified

therein, and that said transcript is a true and correct transcription of my stenographic notes.

Dated at Los Angeles, California, this 22nd day of October, 1953.

/s/ S. J. TRAINOR,
Official Reporter.

[Endorsed]: Filed October 27, 1953. [85]

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

I, Edmund L. Smith, Clerk of the United States District Court for the Southern District of California, do hereby certify that the foregoing pages, numbered from 1 to 28, inclusive, contain the original Petition to Establish Nationality; Declaratory Judgment Under Section 503 of the Nationality Act of 1940; Application for Appointment of Guardian Ad Litem; Order Appointing Guardian Ad Litem; Answer; Stipulation and Order for Substitution of Party Defendant; Findings of Fact and Conclusions of Law; Judgment; Notice of Appeal; Designation of Record on Appeal and Order Extending Time to Docket Appeal and a full, true and correct copy of Minutes of the Court for April 21 and 22, 1953, which, together with original Plaintiff's Exhibits 1, 2 and 3 and Defendant's Exhibits A and B and Reporter's Transcript of Proceedings

on April 21 and 22, 1953, transmitted herewith, constitute the transcript of record on appeal to the United States Court of Appeals for the Ninth Circuit.

I further certify that my fees for preparing and certifying the foregoing record amount to \$2.00, which sum has been paid to me by appellant.

Witness my hand and the seal of said District Court this 27th day of October, A.D. 1953.

[Seal]

EDMUND L. SMITH,

Clerk;

By /s/ THEODORE HOCKE,

Chief Deputy.

[Endorsed]: No. 14106. United States Court of Appeals for the Ninth Circuit. Lew Wah Fook, as Guardian Ad Litem for Lew Suey Yet, Also Known as Lew Thew Yut, Appellant, vs. Herbert Brownell, Jr., as Attorney General of the United States, Appellee. Transcript of Record. Appeal from the United States District Court for the Southern District of California, Central Division.

Filed October 28, 1953.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Court of Appeals for the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit
No. 14320 HW

LEW WAH FOOK as Guardian Ad Litem for
LEW SUEY YET, a/k/a LEW THEW YUT,
Appellant,

vs.

HERBERT BROWNELL, JR., as United States
Attorney General,
Appellee.

STATEMENT OF POINTS

To the Honorable United States Circuit Court of
Appeals for the Ninth Circuit:

Comes now the appellant, Lew Wah Fook as
Guardian Ad Litem for Lew Suey Yet, a/k/a Lew
Thew Yut, and sets forth his statements on appeal
and designation of the record on appeal, as follows:

Statement

I.

The Court erred in not declaring the plaintiff,
Lew Suey Yet, a/k/a Lew Thew Yut, a citizen of
the United States, in view of the direct testimony
of witnesses which was not contradicted, nor were
any material inconsistencies shown on cross-exami-
nation, and the complete lack of any evidence to the
contrary adduced or introduced by the defendant.

BRENNAN & CORNELL

By /s/ WM. E. CORNELL,
Attorneys for Plaintiff.

Dated: November 5, 1953.

[Endorsed]: Filed November 6, 1953.

[Title of Court of Appeals and Cause.]

STIPULATION CONCERNING EXHIBITS

It Is Hereby Stipulated by and between counsel for appellant and appellee, as follows:

I.

That the original exhibits introduced at the time of trial of the within matter need not be printed, and the originals of the same may be considered by the Circuit Court of Appeals on the appeal in this matter.

II.

It is further stipulated that the Immigration files referred to as Defendant's Exhibits "A" and "B" need not be printed, and counsel may append any portion they desire of said Immigration proceedings to their briefs on appeal in the within matter.

BRENNAN & CORNELL,

By /s/ WM. E. CORNELL,

Attorneys for Appellant.

/s/ LAUGHLIN E. WATERS,

United States Attorney;

By /s/ ARLINE MARTIN,

Attorney for Appellee.

[Endorsed]: Filed November 24, 1953.

No. 14106.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

LEW WAH FOOK, as Guardian *ad Litem* for LEW SUEY
YET, also known as LEW THEW YUT,

Appellant,

vs.

HERBERT BROWNELL, JR., as Attorney General of the
United States,

Appellee.

BRIEF FOR APPELLEE.

LAUGHLIN E. WATERS,
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FILED

MAR 24 1954

PAUL P. O'BRIEN
CLERK

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No. 14106.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

LEW WAH FOOK, as Guardian *ad Litem* for LEW SUEY
YET, also known as LEW THEW YUT,

Appellant,

vs.

HERBERT BROWNELL, JR., as Attorney General of the
United States,

Appellee.

BRIEF FOR APPELLEE.

Jurisdiction.

The District Court had jurisdiction of the action under the provisions of Section 503 of the Nationality Act of 1940 (8 U. S. C. 903).

Judgment for the defendant that the plaintiff is not a citizen or national of the United States and that the plaintiff's cause of action be dismissed, was docketed and entered May 14, 1953. There being no dispute that said judgment was a final order, this Court has jurisdiction under the provisions of Title 28, U. S. C., Sections 1291 and 1294(1), of this appeal.

Statutes Involved.

Plaintiff's complaint was filed and served July 10, 1952, at a time when Section 503 of the Nationality Act of 1940 (8 U. S. C. 903) was effective. While that Act was repealed by Section 403(a)(42) of the Immigration and Nationality Act of 1952, which became effective December ~~31~~, 1953, the savings clause in Section 405(a) of the latter Act preserves plaintiff's cause of action. Section 405(a) of the 1952 Act reads in part as follows:

"Section 405(a). Nothing contained in this Act, . . . shall be construed to effect the validity . . . or to affect any prosecution, suit, action, or proceedings, civil or criminal, brought, or any status, condition, right in process of acquisition, act, thing, liability, obligation, or matter, civil or criminal, done or existing, at the time this Act shall take effect; . . ."

Section 903 of the 1940 Act reads as follows:

"§903. *Judicial proceedings for declaration of United States nationality in event of denial of rights and privileges as national; certificate of identity pending judgment*

If any person who claims a right or privilege as a national of the United States is denied such right or privilege by any Department or agency, or executive official thereof, upon the ground that he is not a national of the United States, such person, regardless of whether he is within the United States or abroad, may institute an action against the head of such Department or agency in the District Court of

the United States for the District of Columbia or in the district court of the United States for the district in which such person claims a permanent residence for a judgment declaring him to be a national of the United States. If such person is outside the United States and shall have instituted such an action in court, he may, upon submission of a sworn application showing that the claim of nationality presented in such action is made in good faith and has a substantial basis, obtain from a diplomatic or consular officer of the United States in the foreign country in which he is residing a certificate of identity stating that his nationality status is pending before the court, and may be admitted to the United States with such certificate upon the condition that he shall be subject to deportation in case it shall be decided by the court that he is not a national of the United States. Such certificate of identity shall not be denied solely on the ground that such person has lost a status previously had or acquired as a national of the United States; and from any denial of an application for such certificate the applicant shall be entitled to an appeal to the Secretary of State, who, if he approves the denial, shall state in writing the reasons for his decision. The Secretary of State, with approval of the Attorney General, shall prescribe rules and regulations for the issuance of certificates of identity as above provided. Oct. 14, 1940, c. 876, Title I, Subchap. V, §503, 54 Stat. 1171."

Statement of the Case.

This is a case in which the plaintiff is the alleged son of a Chinese man who was admitted to the United States in 1923 by the Immigration and Naturalization Service, as the son of a native. The plaintiff was born in China, allegedly on September 9, 1935, as the third son of the alleged father, Lew Wah Fook.

When the plaintiff, the alleged number 3 son, and the number 1 and number 2 sons came to the United States, the Immigration and Naturalization Service detained them for hearings to determine whether or not they should be admitted as citizens. There is no dispute that the number 1 and number 2 sons were admitted by the Immigration Service. The plaintiff herein, however, after hearings duly held by the Immigration Service, was determined by that Service not to be a citizen of the United States and was excluded.

Before the cause of action provided in 8 U. S. C., Section 903, arose in 1940, the usual procedure would be for the plaintiff to seek a writ of habeas corpus for review of the Immigration Service Deportation or Exclusion Order, but that was never done in this case. Instead, plaintiff chose to file the present action, thereby getting a trial *de novo* in the District Court, as distinguished from a review of the Immigration Order which the Court would have given in a habeas corpus case.

Herbert Brownell, as Attorney General of the United States, being the "head of the Department" which denied

plaintiff the right or privilege of a citizen, to wit, the right to be admitted to the United States, on the ground that plaintiff was not a citizen, the Attorney General is the proper party defendant in the action.

The District Court, after hearing the testimony of the plaintiff, his alleged father, and his two alleged brothers, gave judgment for the defendant, that the plaintiff was not the person he claimed, was not a United States national, and dismissed plaintiff's cause of action.

The question raised by appellant on appeal is whether or not the decision of the District Court, the trier of the facts, is "clearly erroneous." Appellant relies on the language of *United States v. U. S. Gypsum Co.* (1948), 333 U. S. 364, in which the Court says:

"A finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed."

Appellee believes the real question in the case is whether or not the plaintiff has sustained the burden of convincing the Court that he is the person he claims to be. A reading of the entire record gives rise to *no* firm conviction regarding the question of whether the plaintiff is, or is not, the son of the alleged father, Lew Wah Fook. In fact, after reading the entire record, there is anything but a firm conviction that the plaintiff is the person he claims to be.

Reduced to its simplest terms, the question might be stated thus: Has the plaintiff sustained his burden of proving his American citizenship, if the plaintiff and his father take the witness stand, and in a few short statements say "this is my son" and "this is my father"? Is a person, born in China, who has lived there all his life, entitled to receive a decree of the District Court that he is a citizen on such evidence? Clearly there is little to convince the mind of the Court under such circumstances. What then is the plaintiff's burden? If the Court is not convinced, and a reading of the entire record leaves the mind in a state of doubt, can it be said that the decision of the District Court should be reversed?

Summary of Argument.

I.

THE BURDEN IS ON THE PLAINTIFF TO PROVE HIS AMERICAN CITIZENSHIP AND THE PLAINTIFF FAILED TO SUSTAIN THAT BURDEN.

A. THE TRIAL COURT'S FINDINGS ARE NOT CLEARLY ERRONEOUS.

ARGUMENT.

I.

The Burden Is on the Plaintiff to Prove His American Citizenship, and the Plaintiff Failed to Sustain That Burden.

Many cases are cited in appellant's brief but all are cited to support one argument, which may be summed up in the words of appellant's brief [Tr. 15]:

“here the evidence submitted by appellants to establish their citizenship is positive, uncontradicted and unimpeached. The alleged father and his two admitted sons gave testimony directly upon the issue. No contradictory or countervailing evidence has been submitted. We submit that under the well-settled principles mentioned above the findings of the court below adverse to the claim of appellant is ‘clearly erroneous’ within the meaning of 52(a) of the Federal Rules of Civil Procedure.”

The pertinent provision of Rule 52(a) upon which appellants rely provides:

“Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses.”

Let us see what facts were presented to the trial court by the plaintiff, as revealed by the record, and it may become clear why the trial court did not believe that plaintiff was the son of Lew Wah Fook.

The story is similar to many another Chinese story. The alleged father, Lew Wah Fook, was born in China,

entered the United States as the son of an American citizen, made two trips back to China before the war, and each time upon returning to the United States filled out a statement for the Immigration and Naturalization Service, reporting family facts, including the births of children. The chronology is as follows:

- | | |
|-------------------|---|
| January 18, 1913 | Lew Wah Fook, alleged father, born in Canton, China. |
| July 1923 | Lew Wah Fook entered the United States as son of American citizen. |
| August 1929 | Lew Wah Fook goes back to China, first time. |
| November 9, 1930 | Lew Mon Soong, number 1 son, born (number 1 son admitted to U. S.) |
| April 15, 1931 | Lew Wah Fook returns to U. S. |
| November 1932 | Lew Wah Fook goes back to China, second time. |
| December 2, 1933 | Lew Mon Hing, number 2 son, born (number 2 son admitted to U. S.) |
| May 1935 | Lew Wah Fook returns to U. S. |
| September 9, 1935 | Lew Suey Yut, sometimes spelled Leu Siu Ngoot, plaintiff in the action, alleged number 3 son, born. |
| December 17, 1946 | Lew Mon Tang, alleged number 4 son, born in China (still in China). |

Plaintiff's Exhibit 1 in evidence is Lew Wah Fook's statement on April 15, 1931, to the Immigration Service

on his return from his first trip to China, at which time he reported the birth of the number 1 son. Plaintiff's Exhibit 2, dated July 31, 1935, is Lew Wah Fook's statement to the Immigration Service on his return from his second trip to China, at which time he reported the birth of the second son.

The plaintiff herein, the alleged third son, was born in September, 1935, some four months after Lew Wah Fook returned to the United States. The next evidence we have with regard to the plaintiff is Lew Wah Fook's statement to the Immigration Service, referred to as Government's Exhibit A in evidence, on or about April 21, 1943. This was 8 or 9 years after the plaintiff was allegedly born, and what does Lew Wah Fook report to the Immigration Service at this time? The Transcript of Record [Tr. 71] shows that in 1943, on Government's Exhibit A, he stated regarding a third child, that the name was "Lew Siu Ngoot, sex female, age 9." Nine years after the birth of the third child, allegedly the plaintiff herein, the alleged father is reporting that *that* child was a female.

The next chronological event [Tr. 71] appears to be the questioning of Lew Wah Fook in 1951 [Govt. Ex. B in evidence, pp. 19, 20, 24-26], when the number 1, 2 and 3 sons applied for admission to the United States, at which time Lew Wah Fook told the Immigration Service that he didn't have any daughters, and when they asked him about his statement in 1943 [Govt. Ex. A] he said he didn't remember that application. It also appears from the Transcript [Tr. 71] that in 1951 Lew Wah Fook told the Immigration Service that he "never claimed" any daughters, but when shown the 1943 statement [Govt.

Ex. A] he then remembered he had listed the third child as "female."

At this stage of the evidence, a reasonable person was clearly entitled to believe that the plaintiff, the alleged third son, was not the child of Lew Wah Fook, but was some boy substituted for the third child which had been a girl.

What, if any, explanation was given regarding this testimony, and what other evidence on behalf of the plaintiff, if any, was given to corroborate the bare statements that the plaintiff is the son of Lew Wah Fook?

The record is barren of any other corroborating evidence. In fact, the record on behalf of the plaintiff is the barest minimum, and amounts to very little more than Lew Wah Fook's statement that "this is my son," and the plaintiff's statement (plaintiff's direct evidence [Tr. 60] was one page and a half long); that his father is Lew Wah Fook, and he was born September 9, 1935, and lived with the two brothers, the number 1 and 2 sons. Other than that the plaintiff answered yes to a few leading questions and that is all the evidence he brought before the District Court, and he asked the District Court to find upon that slim record, that he is an American citizen.

The father's explanation of the 1943 statement to the Immigration Service is at pages 20, 24 to 26 of Exhibit B. The explanation had to be a good one, and it is interesting to note that in court, it is placed in the field of Chinese custom where it is difficult to dispute.

Lew Wah Fook's explanation is as follows [Tr. 72-77]:

"Q. (By Mr. Talan, for the Government): Referring to page 42 of Exhibit 1 attached to Defen-

dant's Exhibit B for identification, I ask you whether or not you gave the following answer to this question: 'On this form under "Describe all your children," it says two sons and one daughter, and it gives the third child, Lew Siu Ngoot, born CR 24-12- as female. How do you explain that?

A. I don't know how that come in, I couldn't explain to you. I never was claiming a daughter, I never had one before.'

Q. Did you make that answer?

A. I did make that statement. However, I want to explain that when I said I never claimed a daughter, I did claim a daughter, but I never claimed a daughter to the immigration office, that is what I meant.

The Court: You say you claim a daughter? What daughter do you claim? [68]

The Witness: I thought Lew Thew Yet was a daughter.

The Court: This is the party you were referring to?

The Witness: Yes. I thought he was a girl.

The Court: You mean to say that when this boy was born or when the child was born, you thought a girl was born, is that right?

The Witness: Yes, that's right.

The Court: When did you find out it wasn't a girl?

The Witness: When I was in the Army and I had my leave and went back to the village, I found out it was a boy.

The Court: That is the first time you found out this is a boy?

The Witness: That is my first time.

The Court: Who names Chinese children?

The Witness: The head of the family. In my case, it was my mother.

The Court: Didn't your mother or your wife ever write you after the birth of this child what the name of the child was?

The Witness: I received correspondence saying that my wife gave birth to a child and gave me the name and date of birth, and it was born and it was well, but I just assumed, it was a girl's name, I just assumed it was a daughter. It didn't mention specifically whether it was a boy or a girl, but it was a girl's name, so I deduced it was a girl. [69]

The Court: Don't you think it very strange a girl's name was given to a boy?

The Witness: This was an unusual case, yes.

The Court: May I ask the interpreter a question?

The Interpreter: Yes.

The Court: Have you ever heard in China where a girl's name was given to a boy?

The Interpreter: Yes, it has happened before. There is some sort of superstition. In fact, when I was a child, I had to have my Chinese name changed once because when I was a child I was very sickly and they felt the name had something to do with it, and it didn't suit my nature.

The Court: They didn't give you a girl's name?

The Interpreter: My second name could be interpreted that way.

The Court: There is no question this is a girl's name?

The Interpreter: Mine is questionable, but this is strictly a girl's name. The second name means pretty and a boy would never be called pretty. A girl's

name flows into three or four situations, where they are after something, pretty or esthetic or after a flower or after something that is very delicate. A boy's name would be something strong, something ferocious, like some sort of an animal or something [70] hard, like rock or steel. Chiang Kai Shek's name is rock.

The Court: It would seem to me mighty strange, considering the attitude of the Chinese relative to the difference between a boy and a girl, the male and the female, that they are always celebrating the birth of a boy. I don't know what they do with the girls. The girls in the Chinese race would be exterminated in three or four generations if the ratio we have in these cases applies. We don't have any girls at all.

The Interpreter: There is a time when you do have a girl and they don't mention it. The son they are very proud of. It is some sort of primogeniture.

The Court: It would take a lot of explanation as to why this was done, considering the fact that in China the sons are always the ones that are wanted, they are the ones that carry on the race, so it would take a lot of explanation as to why anybody would name a boy as a girl. It is pretty near inconceivable.

The Interpreter: It is very unusual.

The Court: Ask the witness this: You claim you didn't know this child was a boy until you went back to the village when you were in the Army in 1946 or 1947.

Mr. Brennan: 1946.

The Court: Yes, 1946.

The Witness: It was in 1946 that I first found out it was a boy instead of a girl. Naturally, I was very joyous of [71] the fact and I demanded an ex-

planation. The explanation was that my mother, who was a highly superstitious woman, at the time when the child was born, she went to this idol that they have and through this process of the idol, they shook these little bamboo sticks that have characters in them, and in that way she can get the name for the boy. The name came out from the bamboo sticks stating that it is a girl's name, the child would not live long, so it must be a girl. So subsequently when the child was born and they found out it was a boy, my mother sought to offset the spirits by giving the boy a girl's name, and instructed all the rest of the family not to tell me it was a boy, but to inform me, if they ever had the chance to write to me, to either keep quiet about it or tell me it was a girl.

The Court: When did you get this information? When did you find out this information?

The Witness: When I went back to China in 1946 and I saw my child, and by his features I knew it was a boy. I demanded an explanation. It was at that time that they told me what went on. Right away I was denied of a joyous celebration because it was a boy, and at that very moment when I found out, I wanted to make a ceremony and change the name to a boy's name, but my mother would not let me do so, stating the boy would have to reach the age of 18 before such a process [72] can be undertaken; otherwise, his health would be in jeopardy."

In answer to further questions by the government [T. R. 78-79] the alleged father stated that he claimed "one wife, two sons and one daughter" in his claim of dependents while he was in the Armed Forces, and made the same claim in income tax returns prior to 1943.

Further [T. R. 80-82], the father gave a fantastic explanation as to what was said to him when he first allegedly saw the third child was a boy when he had a furlow to China in 1946. The explanation was as follows:

“Q. (By Mr. Talan, for the government) What is the explanation that was given to you at that time for the fact that the third boy in that house bore the name that was given to him?

A. Prior to the actual birth, my wife was expecting any day, and my mother went to this temple and shook these bamboo sticks. The sticks that fell from this disclosed that I was not due to have a son during that year, and that if I do have, give birth to a son, that is my wife give birth to a son, that person will not live. So in order to offset that, in the event you do have a son, you have to give it a girl's name and you have to train it as if it was a girl until it is 18 years old, and at that time you can change the name and treat it as a boy from there on, but before that you have to treat it as a girl. [77]

Q. Prior to your return to the village in 1946, you never received such an explanation in your correspondence with your family in China?

A. They never informed me, because I don't believe in the Chinese religion or spirits. I am a Christian. I assume if they told me, I would naturally refuse to carry out such antiquated custom. I would make sure there would be a celebration because it was a boy. Also, I would give it a boy's name if I had known about it.

Q. Did anybody in your family consult a fortune teller with respect to the naming of this child?

A. Yes. There was a fortune teller that my mother consulted after she went through this procedure at the

temple, and the fortune teller also told her the same thing, that if it was a son, it would not live long, that we have to give it a girl's name and raise it as if it is a girl."

A. The Trial Court's Findings Are Not Clearly Erroneous.

In view of the above testimony, which the District Court was entitled to disbelieve, and the interpreter's statements [T. R. 75-76], how can it be said that the findings of the District Court, based on the documentary evidence, were "clearly erroneous"?

Many of the cases cited in appellant's brief are cases where the findings of the District Court were set aside because there was written or documentary evidence contrary to the findings of the court, and the oral testimony was conflicting. In this case the documentary evidence [Gov. Ex. A] supports the court's decision. In order to set aside the finding this Court will have to believe that the fantastic explanation given by the father was true and will have to find it was error for the District Court *not* to believe the father's testimony, and that on the entire evidence this Court has a firm conviction that a mistake has been committed. The weight of the plaintiff's case is not sufficient, and the testimony by interested parties too brief for anyone reading the entire record to be left with any definite conviction that the District Court came to the wrong conclusion.

The following cases are of assistance on this problem:

Quock Ting v. United States (1891), 140 U. S. 417;

Mui Sam Hun v. United States, 78 F. 2d 612;

United States v. Gypsum, 333 U. S. 364;

United States v. Oregon Medical Society, 343 U. S. 326.

In the *Quock Ting* case, Justice Field said at page 420:

“There may be such an inherent improbability in the statements of a witness as to induce the Court or jury to disregard his evidence, even in the absence of any direct conflicting testimony. He may be contradicted by the facts he states as completely as by direct adverse testimony; . . .”

In the *Mui Sam Hun* case, in an appeal from an order denying a petition for a writ of habeas corpus, where the immigration record was reviewed, the Court said at page 615:

“The rule is not, as appellant contends, that the applicant need only to make out his case by a fair preponderance of the evidence, for it is not incumbent upon the government to offer any evidence whatsoever. Rather, the burden is upon the applicant to prove his right to admission and the board is the sole judge of credibility of the witnesses, and its finding will not be disturbed without a showing that the hearing was unfair and unreasonable, or that the finding was arbitrary or capricious. The weight of the evidence and the credibility of witnesses is not for us, but for the board.”

The opinion of Justice Jackson in the *Oregon Medical Society* case (*supra*) was written in 1952 and quotes the language in the case of *United States v. Gypsum* (*supra*). In the *Medical Society* case the District Court dismissed the government's complaint under the Sherman Act, after a long trial, on the ground the Government had proven none of its charges by a “preponderance of the evidence.” The trial judge found that no conspiracy to restrain or monopolize medical cases among other findings, and the government asked the Court of Appeals to over-

rule the findings as contrary to the evidence. The Court of Appeals affirmed the District Court's judgment of dismissal and said at page 332:

"We are asked to review the facts and reverse and remand the case 'for entry of a decree granting appropriate relief.' We are asked in substance to try the case *de novo* on the record, make findings and determine the nature and form of relief. We have heretofore declined to give such scope to our review. *United States v. Yellow Cab Company*, 338 U. S. 338."

The opinion then refers to Rule 52(a) of the Federal Rules of Civil Procedure and concludes at page 339:

"We conclude that the Government has not clearly proved its charges. Certainly the court's findings are not clearly erroneous. 'A finding is "clearly erroneous" when, although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed.' *United States v. United States Gypsum Co.*, 333 U. S. 364, 395. The Government's contentions have been plausibly and earnestly argued but the record does not leave us with any 'definite and firm conviction that a mistake has been committed.'

"As was aptly stated by the New York Court of Appeals, although in a case of a rather different substantive nature: 'Face to face with living witnesses the original trier of the facts holds a position of advantage from which appellate judges are excluded. In doubtful cases the exercise of his power of observation often proves the most accurate method of ascertaining the truth . . . How can we say the judge is wrong? We never saw the witnesses . . .

To the sophistication and sagacity of the trial judge the law confides the duty of appraisal.' *Boyd v. Boyd*, 252 N. Y. 422, 429, 169 N. E. 632, 634."

In the *Gypsum* case (*supra*) the District Court granted a motion to dismiss after presentation of the Government's case in a suit by the United States to restrain alleged violations of the Sherman Act. The Court made many findings, and regarding Finding 118, the trial court found that the evidence "fails to establish that defendants associated themselves in a plan to blanket the industry under patent licenses and stabilized prices." After discussing the evidence on the question of conspiracy, the Court says at page 399:

"The government relied very largely on documentary exhibits, and called as witnesses many of the authors of the documents. Both on direct and cross-examination counsel were permitted to phrase their questions in extremely leading form, so that the import of the witnesses' testimony was conflicting. On cross-examination most of the witnesses denied that they had acted in concert in securing patent licenses or that they had agreed to do the things which in fact were done. Where such testimony is in conflict with contemporaneous documents we can give it little weight, particularly when the crucial issues involve mixed questions of law and fact. Despite the opportunity of the trial court to appraise the credibility of the witnesses, we cannot under the circumstances of this case rule otherwise than that Finding 118 is clearly erroneous."

The Court also said at page 395:

"The practice in equity prior to the present Rules of Civil Procedure was that the findings of the trial

court, when dependent upon oral testimony where the candor and credibility of the witnesses would best be judged, had great weight with the appellate court. The findings were never conclusive, however. A finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed."

The *Gypsum* case and *Fleming v. Palmer*, 123 F. 2d 749, cited by appellants, announces propositions which are of value as guides only when applied to the facts of a particular case. In the *Fleming* case the District Court found that the business was controlled by the Palmers and not by the workers. The Court of Appeals, after reviewing the evidence which was largely documentary, for ten or eleven pages of its opinion, concludes:

"A thorough study of the record has disclosed that Palmer possessed extraordinary powers. Whatever powers he might possibly have lacked were lodged in the group of employees most naturally inclined to be favorable to him. The history of the formation and operation of the cooperative, the Articles of Incorporation and the By-Laws do not reveal an industrial democracy governed by the workers. We have been forced to conclude that the district judge's finding that the workers and not the Palmers controlled the business and this cooperative is against the clear weight of the testimony and must be set aside."

That is a far different case than the present one. It would appear that the Court of Appeals lends greater credibility to documentary evidence as distinguished from oral testimony.

With regard to the cases cited by appellant on the question of discrepancy testimony, the recent opinion of this Court (January 12, 1954) in the case of *Margong v. Brownell*, F. 2d, is in point. This Court said:

“This Court has had occasion recently to uphold the findings made by the trier of facts which refused to credit a witness’ testimony even although that testimony is not contradicted. *National Labor Relations Board v. Howell Chevrolet Company*, 204 F. 2d 79, 86 (Affirmed *Howell Chevrolet Co. v. National Labor Relations Board*, U. S., Dec. 14, 1953) (citing other cases in a footnote). Upon the plaintiff’s own theory all of the witnesses who testified on his behalf are interested and when viewed in this light their mere say-so does not have to be accepted. (Citing cases.)”

Judge Goodman in the case of *Ly Shew v. Acheson*, 110 Fed. Supp. 50, at 58, states that the rule is that the proof of alleged citizenship must be “clear and convincing.” Other cases to this effect are *Lee Fin v. United States* (C. C. A. 2), 218 Fed. 432; *Ex parte Chin Him*, 227 Fed. 131.

The enunciation of rules of proof appears to be of little help. The decision as to whether the plaintiff has sustained his burden to “convince” the Court, is directed to the “conscience” of the Court, and where as in this case, a reading of the full transcript leaves the Court in grave doubt as to whether or not the plaintiff is a citizen, and when, in good conscience the Court cannot make a finding that the plaintiff is a citizen, in view of the record, the finding and decision of the District Court that plaintiff is *not* a citizen, should not be set aside.

That the burden is on the appellants to prove their alleged United States nationality has been the view of this Court in the following cases:

Jung Yem Loy v. Cahill, 81 F. 2d 809;

Wong Choy v. Haff, 83 F. 2d 983;

Wong Ying Leon v. Carr, 108 F. 2d 91.

It is respectfully submitted that the decision and the findings of the District Court should be affirmed.

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No. 15,045✓

See Vol. 3035

United States Court of Appeals
For the Ninth Circuit

LOUIS L. MAIDEN,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

UNITED STATES OF AMERICA,

Appellant,

vs.

LOUIS L. MAIDEN,

Appellee.

Appeal from the United States District Court for the
Northern District of California,
Southern Division.

BRIEF OF APPELLANT,
LOUIS L. MAIDEN.

JAY A. DARWIN,

68 Post Street, San Francisco 4, California,

Proctor for Appellant, Louis L. Maiden.

FILED

JUN 21 1957

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No. 15,045

United States Court of Appeals For the Ninth Circuit

LOUIS L. MAIDEN,

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Appeal from the United States District Court for the
Northern District of California,
Southern Division.

BRIEF OF APPELLANT, LOUIS L. MAIDEN.

STATEMENT OF JURISDICTION.

The appellant,¹ a seaman appeals from the judg-

¹There are cross-appeals herein. Libellant below, is aggrieved by the failure to find in his behalf for the claimed negligence of respondent below, and for the breach of the traditional seaworthiness warranty. Respondent's cross-appeal questions the propriety of the maintenance award. Thus there are two "appellants". However, in this brief, libellant below will be referred to as the appellant.

ment below, which grants him maintenance for injuries sustained aboard appellee's vessel, but denies him the damages which he seeks because of appellee's negligence and the breach of its warranty of seaworthiness of the vessel, its appurtenances and its crew (Cl. Tr. 43-44),² upon Findings of Fact and Conclusions of Law made by the Court below (Cl. Tr. 35-42.)

JURISDICTION OF THE DISTRICT COURT.

The jurisdiction of the District Court is granted pursuant to the provisions of the Jones Act, 46 USC Section 688, under 46 USC Section 1241(a), Public Law 17, 78th Congress, under the General Maritime Law, Civil and Maritime, and under the provisions of 28 USC, Section 1331.

JURISDICTION OF THE COURT OF APPEALS.

The jurisdiction of this Court is granted by the provisions of Title 28 USCA 1291, which gives to this Court jurisdiction of all appeals from final decrees of District Courts of the United States.

QUESTION PRESENTED.

Whether, under Admiralty Rule 46 $\frac{1}{2}$, the Trial Court's findings are so clearly erroneous as to leave

²Reference is to Clerk's Transcript.

this Court with the definite and firm conviction that a mistake has been committed.

STATEMENT.

Appellant, the boatswain on appellee's vessel, the S/S LOMA VICTORY, was injured at sea on January 9, 1953. Since then, he has been, and still is, permanently disabled from sailing again.³ This appeal does not present any substantial conflict of testimony. Indeed the credible evidence below is such as to obviate the need for any resolution of conflicting testimony, * * * for there is no real conflict. Hence, within the ambit of the *McAllister* case,⁴ the cumulative significance of the weight of all the evidence is such as to permit this Court to find that as to the appellant, the judgment below is so clearly erroneous as to leave this Court with the definite and firm conviction that a mistake has been committed. That is so even though, arguendo, there may be some slight evidence to support the judgment.

Based upon the following factors, or upon any combination of them, or indeed upon any one of them, the appellant is entitled to a reversal of the judgment below.

I. Appellant was an experienced and careful seaman.

³He is at this very moment still being treated for his injuries at the United States Public Health Service Hospital, i.e., Marine Hospital, San Francisco. See also Findings of Fact Nos. 14-20 (Cl. Tr. 39-40) and Conclusions of Law Nos. 2, 7 and 8 (Cl. Tr. 41).

⁴*McAllister v. United States*, 348 U.S. 19.

II. The weather was extremely rough from the beginning of the voyage, and for 8 continuous days thereafter.

III. From the very first day of sailing and up to the time when appellant was injured, the cement and concrete at the hawsepipe on the starboard side of the windlass broke frequently.

A. The defective “plugs” or “wedges” and the absence of good “plugs” or “wedges” caused the cement and concrete to break.

B. The failure to “lash” or “trice” the anchor chains, also caused the cement and concrete to break.

C. The absence of catwalks and lifelines at the forecastle head added to the danger which confronted appellant.

IV. Work parties were compelled to inspect the windlass and defective cement and concrete base at the starboard hawsepipe at least twice daily.

A. Only an emergency warranted an inspection on the deck on day of accident.

B. It was necessary to examine the starboard hawsepipe by viewing the front of the windlass.

C. On the day of the accident, appellant was ordered to check the cracked cement and concrete at the starboard hawsepipe of the windlass.

1. The chief mate did not accompany appellant on inspection tour; this was consistent with prior practice on other tours of inspection.

2. The officers’ “bridge” was not always notified of work parties on deck; nor was it

the duty of appellant or any other unlicensed seaman to do so.

V. The ship's officers knew that appellant and others were to make an inspection at time of accident.

A. Officers on the bridge failed to observe the work party; if the watch officer had looked, appellant would have been plainly visible at his work.

1. A stand-by lookout on the starboard wing of the bridge would have seen appellant at work; the captain had refused to authorize a lookout there.

B. The bridge officer ordered the vessel to increase speed at 4:21 P.M. on January 9, 1953, while appellant was inspecting the broken cement, thus causing a sudden wave to break over the bow which injured appellant.

1. The deck log entry that the accident happened at "1617", i.e., at 4:17 P.M. on January 9th is wrong.

VI. Second Mate Mehallo was not a credible witness.

VII. Appellant is permanently disabled; he will probably never sail again.

ANALYSIS OF THE EVIDENCE.

I. APPELLANT WAS AN EXPERIENCED AND CAREFUL SEAMAN.

Appellant has sailed in the deck department since 1922, in all ratings, both licensed and unlicensed. (R.

129, lines 13-24; 164-167).⁵ As boatswain on this vessel he had the complete confidence of the chief mate, his immediate superior (R. 509, lines 7-22), and always “went out of his way to do everything possible” (R. 498, lines 1-20). Murray, the chief mate put it this way:

“Q. Now, Captain, do you know of any reason why Mr. Maiden went out on the deck as he did before meeting you to make that inspection, if you know?

A. I take it that Mr. Maiden was a very fine sailorman and went out of his way to do everything he possibly could for me. He was efficient and naturally—possibly he wanted to take a little of the work off my shoulders at that time. Mr. Maiden, I will say, was first-class sailor, and he undoubtedly, repetition, as I say, he wanted to help me all he could. He knew the conditions on deck and that didn’t warrant a lot of safety.” (R. 498, lines 1 to 17.)

Appellee’s expert conceded that appellant was not negligent in the manner in which he performed the inspection at the time he was injured. He also agreed that if the planes at the No. 2 hatch needed attention because of defective lashings, it was normal for appellant to go forward by using the starboard ladder to reach the foredeck, if he was under orders to attend the broken cement (R. 560, line 4 to R. 561, line 1). He also conceded that complete care and safety of equipment and appurtenances of the vessel itself required appellant to examine the hawsepipe from in

⁵Reference is to Reporter’s Transcript on Appeal.

front of the windlass (Ex. 2 and 15)⁶ as well as from its after end (Ex. 3) (R. 559, line 23 to 561, line 9).

II. THE WEATHER WAS EXTREMELY ROUGH FROM THE BEGINNING OF THE VOYAGE AND FOR 8 CONTINUOUS DAYS THEREAFTER.

The deck log (Appellee's Ex. B) shows that extremely heavy weather was encountered after the vessel left San Francisco on January 2, 1953. Log entries beginning with January 1, 1953, and down to January 9, when the accident occurred, contain such entries as for example: "heavy sea" (p. 31)⁷; "very high and rough sea"; "commence taking green seas" (p. 37); "vessel laboring in confused sea" (p. 41); and finally on January 7 to 9 inclusive, the weather was even worse than on the earlier days (pp. 49-53).

The weather was so bad and treacherous, with most of the force wind and pitching of the vessel being on the starboard side (R. 420, line 1 to 421, line 15) * * * the side on which appellant was injured, * * * so as to cause an order to be issued that no one was to go on deck except by permission of the chief mate or the captain (R. 318, lines 1-13). The second mate stated that on January 9, 1953, there were rough seas, gale winds and mountainous swells (R. 392, lines 7-11). Surrell, the ship's carpenter stated that on the day appellant was hurt the captain had told him (Surrell)

⁶Unless otherwise stated, reference to exhibits is to appellant's (libelant's) exhibits.

⁷The deck log (Appellee's Ex. B) is numbered in pencil at the bottom of each page.

not to go onto the forepeak of the ship because the weather was so rough and the vessel was taking seas (R. 71, line 21 to 72, line 13). He had not gone on deck for 3 days prior to and including the day of the accident.

The vessel had to be "hove to" in order to permit the necessary repairs. This was because the weather was so bad the first day out of port, when the cement at the starboard hawsepipe first broke (R. 140, lines 1-25; 141, lines 1-5).

III. FROM THE VERY FIRST DAY OF SAILING AND UP TO THE TIME WHEN APPELLANT WAS INJURED, THE CEMENT AND CONCRETE AT THE HAWSEPIPE ON THE STARBOARD SIDE OF THE WINDLASS BROKE FREQUENTLY.

The first evidence of the break-up of the cement and concrete (Ex. 1) was about one to one and a half hours after the vessel left San Francisco. The repairs were made under the supervision of the chief mate, who, as the cement breakage continued, ordered the carpenter to use the makeshift of stuffing rags around the opening through which the chains extend into the chain locker, to prevent the entry of water therein (R. 40, line 11 to 43, line 21). Although the chief mate acknowledged that the carpenter did a good job under the circumstances (R. 486, line 19 to 487, line 7), he admitted that a good grade of cement would have withstood the weather. He further stated that the four or five available sacks of cement were of inferior quality and did not harden properly (R. 503, lines 3-17).

In normal weather, as the vessel rolls, there is a certain amount of sway of the chains leading into the chain locker through the hawsepipes. To reduce the sway, concrete or cement is poured onto blocks of wood, sometimes called “plugs” (Ex. 12), which encircle the chains. The result is that the chains are held “pretty tight,” thus preventing any undue friction of the chains against the cement. Since one of the wooden blocks was defective, the starboard chain rubbed against the cement to such an extent that because of the extremely rough weather the cement cracked and the defective “plug” fell into the chain locker, thereby subjecting the cement to further friction, resulting in a constant break-up of the concrete (R. 43, line 22 to 47, line 15).⁸ Under these circumstances, the failure to take the customary precaution of lashing or tricing the chains together resulted in more friction of chain against concrete, thus creating a constant condition of broken cement, requiring the daily check-up of the starboard windlass (R. 311, lines 21-24).⁹

A. The defective “plugs” or “wedges” and the absence of good “plugs” or “wedges” aboard the vessel caused the cement and concrete to break.

Appellee’s witness, Captain Murray, who has been going to sea for 53 years, 30 of which he has sailed as Master (R. 484, line 11 to 485, line 13), virtually made out the appellant’s case. Murray was corrobora-

⁸This matter is more fully discussed in Section III-A of this brief, *infra*.

⁹This matter is also dealt with in Section III-B of this brief, *infra*.

rated by appellant's expert witness Captain Healy, who himself has been going to sea since 1918 (R. 533-534). Captain Murray admitted that the reason for the trouble at the hawsepipe was because "we didn't have some of the gear we would like to have used" (R. 522, line 20). The following colloquy took place between him and appellee's proctor:

"Q. * * * I ask you this question, Captain, in regard to the cementing of the hawsepipes: In your experience during rough weather at sea is it necessary and proper to inspect the hawsepipes and their cement on occasions whether they are cracked out or cracking out or not? Isn't it usual to inspect the hawsepipes at sea in heavy weather, in any event?

A. This is one of the few times in my life that we had the condition we had at this particular time. The majority of steamship companies have proper * * * This particular ship being an N S A ¹⁰ vessel and many operators have had her, and naturally we didn't have the gear we would like to have used." (R. 522, lines 6-20).

Even though he stated that inspections at the bow would normally be required (R. 523, lines 1-18) he was emphatic that the "wedges" were worn and needed special attention. He also stated "but if we had had proper cement we wouldn't have had any trouble at all" (R. 522, lines 22-25).

Appellee's expert, Captain Healy, explained the necessity of good "plugs" or "wedges" around the

¹⁰National Shipping Authority.

chains at the hawsepipes, to eliminate the likelihood of the cement cracking at sea (R. 537, line 14 to 539, line 14). He corroborated Captain Murray's testimony as to the effect of defective plugs, as follows:

"Q. Well, I don't know if you were here in court, but you must have heard that one of the plugs had fallen through and into the chain locker? You heard that?

A. Well, in an uneven hole, anything gets sideways, it will fall through.

Q. And if the plug falls through—if the plug falls through——

A. (Interposing) The damage is done" (R. 557, lines 12-18).

"Q. That's right. In other words, it was essential, among other things, to have kept the cement in good order, isn't that right?

A. To the best of their ability, yes." (R. 558, lines 4-7).

Surrell, the ship's carpenter who had sailed as boatswain on other vessels (R. 50, line 7), said that he had only had one set of plugs aboard the vessel. When one of the plugs broke he had no other to use as a replacement. Thereupon, on orders of the chief mate, he constantly had to stuff the resultant opening with burlap, but to no avail; that the cement, having a tendency to break in a heavy sea, had broken on both sides, but more on the starboard side; that when the concrete first broke, the chief mate told him to stuff the opening with rags for they had no extra plug available; that although he had sailed for a long time in many ratings, including that of boatswain, he had

never before used rags for such a purpose (R. 53, line 21 to 58, line 24).

Captain Murray sought to justify the insufficient makeshift of gunnysacks and rags because the plugs had been "washed out." He stated that in such circumstances it would have been good practice to tie the anchor chains together to eliminate the destruction of the cement caused by the constant friction of the chains against the cement (R. 486, line 3 to 489, line 2).¹¹ The worn and defective plug was ascribed by Murray as another reason why the concrete did not harden, thus causing it to break (R. 504, lines 8-16).

B. The failure to "lash" or "trice" the anchor chains, also caused the cement or concrete to break.

Murray admitted that tricing (tying together) the chains would have eliminated their constant sway which would have avoided the wear upon the casement where the cement is applied, thus eliminating the breakdown of the cement (R. 504, lines 17-23; 505, lines 1-5). Tricing the chains is no danger to safety of navigation (R. 505, line 6 to 506, line 24). It could have been done when the concrete broke on the first day after the vessel left San Francisco. It could certainly have been done the day before the accident, for on January 8th several seamen had been in the anchor chain locker (into which the chains hang) to see if it was affected by the entry of the seas which

¹¹The failure to tie the chains together and its consequences are discussed in Section III-B of this brief, *infra*.

had washed into the hawsepipes by reason of the cracked concrete (R. 506, line 25 to 508, line 12).

When the defective plug fell into the chain locker, the chief mate again told the carpenter to apply the cement, thus ignoring the latter's earlier suggestion to "lash" the chains when the cement had broken for the first time about one day after the vessel left San Francisco (8 days before the accident). The carpenter illustrated with Ex. 11 how he had successfully triced the anchor chains on other vessels (R. 47, line 16 to 49, line 8).

The chief mate did not order the appellant to tie the anchor chains although he too had many times triced anchor chains on other vessels to avoid the breaking of concrete at the hawsepipes, without the slightest risk to safety of navigation (R. 142, line 16 to 145, line 6).

Appellee's expert, Captain Healy, conceded that if the chains had been triced their side-to-side movement would have been arrested, thus eliminating the likelihood of the constant break-up of the concrete or cement (R. 556, line 8 to 557, line 2).

C. The absence of catwalks and lifelines at the forecastle head added to the danger which confronted appellant.

The deck log shows that on January 2nd, when the vessel left San Francisco, "all precautions were taken for safety of crew. Catwalks, stairs, life lines, *both fore and aft*, for the safety of crew" (Emphasis supplied) (Res. Ex. B, page 33). When the heavy seas were encountered, the catwalks were washed

away (Res. Ex. B, entry of January 5th, at page 41). Mehallo, the second mate, admitted that the official printed instructions *in front of the deck log*, require official entry as to any rigging and unrigging of life lines and catwalks (R. 464, lines 17-25). But there is no entry after January 2nd, and up to the time libelant was injured that any of these life preserving appurtenances were ever restored, * * * for none of these precautions were in fact ever again undertaken.

Mehallo at first denied that there had been any catwalk on the vessel (R. 422, lines 20-22). However, following a recess at the trial below, he changed his testimony, and referring to appellee's proctor, stated, "Well, he told me there was a catwalk and it was washed away" (R. 443, line 15 to 444, line 2).¹²

The appellant stated that the forward catwalk had washed away and had not been replaced, and that there was no safety line at the forecastle head (R. 133, lines 3-15; 174, lines 3-10). Though there was an insufficient chain rail (R. 173, lines 2-17), he had no right to order a lifeline, for only the chief mate is authorized to do so (R. 174, line 24 to 175, line 5).

¹²In referring to this matter, appellant does not even remotely intend thereby to impugn the motives of appellee's proctor.

IV. WORK PARTIES WERE REQUIRED TO INSPECT THE WIND-LASS AND DEFECTIVE CONCRETE BASE AT THE STARBOARD HAWSEPIPES AT LEAST TWICE DAILY.¹³

The chief mate stated that the twice-daily inspections had been so well known to all, that the Army sergeant who always accompanied the ship's personnel on these inspection tours, knew the exact time and place of the commencement of these inspections. Thus, on the day when appellant was injured, the sergeant, without having been told when the inspection was to start, but being aware that the afternoon inspection commenced at 4:00 P.M., was waiting at the No. 5 hatch at that hour on January 9th (R. 514, line 21 to 515, line 6).

A. Only an emergency warranted an inspection on the deck on the day of the accident.

The chief mate admitted that the broken concrete was of "chief concern" on January 7, 8 and 9, and therefore inspections at the hawsepipes on the day when appellant was hurt was an emergent situation (R. 502, lines 5-17).

"Q. And the need to send a crew of men out forward at the forecastle head in such rough, inclement head (sic) was really one of an emergency situation which was in existence at the forecastle head and because the water was being admitted into the chain locker, isn't that right?

A. That is correct." (R. 502, lines 12-17).

¹³This point is developed more fully in Section V of the brief, *infra*.

Thus, except for the broken concrete, Murray would not have sent anyone out on deck because of the extremely bad weather (R. 532, lines 17-24).

Appellee's expert conceded that it is important to examine for broken concrete at the hawsepipes in order to avoid the admission of water into the chain locker. Otherwise, it could cause much damage to stores, water tanks and other equipment situated there. It would also make the bow "heavy at the head." (R. 548, line 10 to 555, line 4). Therefore it was necessary, in these circumstances, to send men out for inspection or repairs (R. 556, lines 1-7).

The second mate likewise had been concerned about the deck cargo on his morning watch on January 9th, and he had sent his "standby" man to check the cargo. However, unlike the disregard for appellant's safety which resulted in the latter's injury, Mehallo said "But I make sure he (the standby man on Mehallo's watch) is in a safe position to do that before I send him" (R. 392, line 7 to 393, line 16).

B. It was necessary to examine the starboard hawsepipe by viewing the front of the windlass.

Appellee imputes negligence to appellant because he examined the hawsepipes for broken concrete in front of, rather than from the rear of, the windlass. The inspection could have been done from the aft end of the windlass, but with considerable difficulty and less effectively.

Surrell, the carpenter stated that in order to inspect for broken concrete from the aft end of the windlass it would have been necessary to crawl over consider-

able machinery (R. 81, line 4 to 82, line 4; Ex. 3). It was more desirable to examine forward of the windlass because there are fewer mechanical impediments to a fuller view of the hawsepipe casement section, as well as of the chain hooks of the "devil's claws" which are also there (R. 82, line 22 to 84, line 16; Ex. 2).

Appellant explained his reasons for the inspections at the bow portion of the vessel when the accident occurred (R. 134, line 5 to 138, line 17; Ex. 15). Though it was somewhat more of a risk, he felt that as a good seaman, he ought to examine the other appurtenances at the bow, in addition to the inspection of the defects at the hawsepipes (R. 312, line 7 to 313, line 18; 330, line 7 to 331, line 11).

Appellee's expert, at first maintaining that the inspection should have been made by examining the rear end of the hawsepipe, conceded that it was perfectly proper for appellant to have conducted the examination as he did (R. 561, line 2 to 563, line 14). He conceded the point as follows:

"Q. Well, let me ask you very frankly Captain Healy, if you were doing it yourself and you wanted to make perfectly sure that the things that had given so much trouble for days and days were all secured, you would also go around the forward part of it as shown in Libellant's Exhibit 15, wouldn't you?

A. Let me study this picture a minute.

Q. Yes, sir.

A. *In all fairness, I suppose if a person wanted to be perfectly sure, he could walk around*

the fore part and take a look at it." (R. 563, lines 4-14) (Emphasis supplied).

- C. On the day of the accident, appellant was ordered to check the broken cement and concrete at the starboard hawsepipe of the windlass.

The chief mate stated that he told appellant to make the inspection at 4:00 P.M. on January 9th. Because it was getting dark and the crew's dinner was to be served at 5:00 P.M. the inspection had to be completed before that time (R. 515, lines 13-22).

The second mate stated that sundown was at 1632 (4:32 P.M.) and that the inspection which took at least 20 minutes had to be completed before sundown (R. 462, line 14 to 463, line 13).

An ordinary seaman who was present in the crew's mess room when these instructions were issued, stated that although he did not overhear all of the conversation between the chief mate and the appellant, he heard enough to recall that the chief mate did not ask appellant to meet the former in appellant's quarters before the inspection tour was to begin (R. 25, line 16 to 26, line 11; 34, lines 7-10).

Sarte, the able bodied seaman was on the 4-8 watch. He testified that on January 9th, at about 3:40 P.M. appellant directed him to accompany the latter on the inspection tour. He and appellant met the Army sergeant at 4:00 P.M. at the No. 5 hatch located on the aft end of the vessel, and worked forward to the windlass (R. 91, line 17 to 97, line 11).

Appellant told about the chief mate's orders to him to conduct the inspection on the day he was injured

“before it gets dark.” He was not told to notify the officer on the bridge of the inspection tour, nor was he asked to wait in his room to be joined by the chief mate. The inspection started a few minutes after 4:00 P.M., but immediately before that time he had stopped at the chief mate’s room, but the latter was not there.¹⁴ (R. 145, line 7 to 148, line 15; 322, lines 10-18; 323, lines 14-19).

The second mate corroborated appellant that the practice was for the chief mate to notify the officer on the bridge when an inspection was to be made, in order to slow down the vessel, and that it is not the duty of an unlicensed seaman to do so (R. 454, line 1 to 455, line 4.)

1. The chief mate did not accompany appellant on inspection tour; this was consistent with prior practice on other tours of inspection.

The chief mate admitted that he did not always accompany others on the inspection trips, although he did so about 90% of the time (R. 508, line 20 to 509, line 22). This was consistent with appellant’s testimony in that respect, who also added that when the chief mate was busy¹⁵ he went out without him (R. 138, line 22 to 139, line 19). The chief mate told appellant that he had to relieve the third mate on the bridge before 4 P.M. (which he did). Appellant could have inferred that he was to proceed with the

¹⁴The chief mate at that time was busy on the bridge relieving the third mate who had to attend a sick seaman in the latter’s quarters. See Section V of this brief, *infra*.

¹⁵See footnote No. 14, *supra*.

inspection without waiting for the chief mate (R. 494, lines 12-18).

Manning, one of the ordinary seamen, testified that 3 hours before the accident occurred, he and an A.B. inspected the topping lift chain at the aft end of the vessel, and according to practice, the chief mate was not with them (R. 26, line 16 to 31, line 2).

2. The officer's bridge was not always notified of work parties on deck; it was not the duty of appellant or any other unlicensed seaman to do so.

When Ordinary Seaman Manning and an A.B. did the work described just immediately above, the watch officer on the bridge was not notified (R. 28, lines 4-9).

The appellant testified that from the very first cargo inspection which took place on the first sailing day, and thereafter, the chief mate, and not he, was to notify the bridge of the work party on deck (R. 134, line 20 to 135, line 16). The second mate corroborated appellant (R. 454, line 1 to 455, line 4). The former also testified that he did not know whether Russell the third mate, whom he had relieved shortly before 4:00 P.M. on January 9th had been notified by the chief mate of the inspection party due to go out at 4:00 P.M. that day¹⁶ (R. 453, lines 14-21). However, Mehallo, the second mate, said he knew nothing about the inspection trip (R. 405, line 2 to 406, line 3).

¹⁶Russell was actually so notified by the chief mate. See Section V of this brief, *infra*.

V. THE SHIP'S OFFICERS KNEW THAT APPELLANT AND OTHERS WERE TO MAKE THE INSPECTION AT TIME OF ACCIDENT.

The chief mate relieved Russell, the third mate on the bridge at about 3:45 P.M. on January 9th, to permit the latter to attend an ailing seaman in the latter's forecastle (R. 494, lines 7-22). At that time he told Russell that there would be an inspection at 4:00 P.M. on the day of the accident. An entry to that effect was logged by Russell which he initialled (Resp. Ex. B, p. 61, entry at "1500"), although by mistake it was recorded as 1500 (3:00 P.M.) instead of 1600 (4:00 P.M.) (R. 500, lines 1-8; 501, lines 1-25; Resp. Ex. B, p. 61). This notice was in keeping with prior practice (R. 509, lines 7-22), and the third mate may have forgotten to report it to the second mate who relieved him at 4:00 P.M. (R. 510, lines 11-22). Such notice to the bridge was consistent with similar notifications between at least January 6th and 9th. Because these daily inspections were at fixed times, and the chief mate was aware of them, the appellant did not specifically tell the chief mate about them on dates prior to January 9th (R. 317, lines 3-25). The chief mate corroborated appellant on this point (R. 492, line 6 to 494, line 6).

The second mate, who testified that he was unaware of the inspection, claimed he was not told about it by either the chief mate or the third mate (R. 394, lines 2-22). However, even if that was so, he failed to see the log entry when he reviewed the work of the prior watch with the third mate (Resp. Ex. B, p.

61 in pencil at bottom of page) when he took over the watch from Third Mate Russell.¹⁷

- A. Officers on the bridge failed to observe the work party; if the watch officer had looked, appellant would have been plainly visible at his work.**

Second Mate Mehallo, the officer on the bridge when the accident occurred, had made a routine inspection of the vessel from the *port* wing of the bridge, and saw no one on the deck. He did *not* make an observation from the *starboard* wing—the side of the vessel on which appellant and the others were then working (R. 394, line 23 to 395, line 17). The deck cargo did not obscure his clear view of the forward deck or of the forecastle head (R. 395, line 23 to 396, line 17). Nor did the booms which were “collared” obstruct his view from any portion of the vessel and he had a *perfect view* of the fore-castle head (R. 469, lines 16-19). In agreeing that Exs. 5, 6, 7 and 8 were fair representations of the clear and unobstructed views which he had of the forward portion of the ship, including the forecastle head on the day of the accident, he said as to the forecastle area, “It was clean and bare up there” except for the machinery on the forecastle head (R. 401, lines 5-8; 448, line 22 to 450, line 1). He did

¹⁷Since the log entry erroneously stated the inspection at 1500 (3 P.M.) instead of 1600 (4 P.M.) it may also be that the second mate may have seen it and may then have been under the mistaken belief that the inspection had been completed by the time he took over the watch at 4 P.M.; or he may have seen the entry in his “routine” review (R. 415, lines 6-9) of the prior watch with the third mate and may have been told that it was really a 4 P.M. inspection, which he then promptly must have forgotten.

say that if a seaman, while working at the windlass, is bent over, he could not be seen from the bridge (R. 402, line 13 to 403, line 2).

The chief mate's testimony was in substantial agreement with that of the second mate (R. 511, line 7 to 513, line 8; Exs. 2 and 7). He specifically confirmed the fact that neither the planes on deck, nor the "collared" booms, in any way impeded the view of the forecastle head from the bridge (R. 513, line 15, R. 514, line 16). Testifying with reference to the log entries, he showed that at the time of the accident "visibility was good" (R. 515, line 23 to 516, line 4).

Surrell, the ship's carpenter testified that from his room in the crew's quarters which is on a lower deck from the bridge (Ex. 20), he was in a position to, and did see, the work party just before appellant was hurt (R. 73, line 4 to 75, line 7).

Appellant stated that the windlass machinery, being four and one-half feet high, could be seen from the bridge (See Ex. 2—the two uppermost circular port-holes (windows) shown in background of photograph; see also Ex. 15; see particularly Ex. 5, taken from starboard port-hole of the bridge showing starboard side of forward deck and forecastle head, and Ex. 6, taken from the port port-hole of the bridge showing port side of forward deck and forecastle head) but also conceded that he might have been obscured from the bridge, if he had been bending forward. He denies that he crouched forward as he examined the hawsepipes, although he conceded that he simply

“could have had my head bent down” (R. 332, line 3 to 333, line 23).

Ex. 20 shows the measurements and the dimensions of the block diagram of the engineer’s drawing of the main deck of the vessel, and also the area in which appellant was injured. The measurements were stipulated at R. 581 to 584. (See also the markings on Ex. 20, which reflects some of these measurements). The physical measurements (reviewed hereafter) are such as to establish the clear visibility of appellant anywhere forward of the bridge including the place where the accident occurred.

1. A stand-by lookout at the starboard wing of the bridge would have seen appellant at work; the captain had refused to authorize a lookout there.

The second mate admitted that he should have had a lookout on the bridge, but that the captain had not authorized one. If he had had such a lookout he would have seen the appellant and the work party. The following is the testimony in this regard:

“Q. I am speaking of the standby and lookout which generally is required when you are going along in pretty bad weather up on the bridge along with the man on the wheel. Don’t you know about that?

A. *The Master had no orders to that extent.*

Q. And that is the reason you didn’t have one; is that correct?

A. No.

Q. *So if the Master had given the order, you would have abided by what is good seamanship by having an extra man?*

A. *That is right.*

Q. Now if you had had that extra man, in addition to your having made the observation on the port side, *he would then have been able to brace himself and get over on the starboard and take a look, wouldn't he?*

A. *That is right he could.*

Q. And you know now, of course, that the accident happened to Mr. Maiden on the starboard side of the forecastle head?

A. That's right." (R. 422, lines 1-19) (Emphasis supplied.)

B. The bridge officer ordered the vessel to increase speed at 4:21 P.M. on January 9, 1953, while appellant was inspecting the broken cement, thus causing a sudden wave to break over the bow which injured appellant.

The accident happened at 4:21 P.M. (1621) on January 9th. At that moment the engine log (Resp. Ex. C—"Date Jan. 9-10-53" shown in pencil as page 20, the entries between 4 to 8 P.M.), shows that the engine's revolutions per minute, i.e. r.p.m.'s were increased from 40 to 55. The r.p.m.'s had been 50 at 4:10 P.M. (1610) and continued at that rate to 4:18 P.M. (1618) when they were reduced to 40 r.p.m.'s. Three minutes later, at 4:21 P.M. (1621) the r.p.m.'s were increased to 55. The next change occurred four minutes after the accident occurred. This change took place at 4:25 P.M. (1625) when the r.p.m.'s were reduced from 55 to 30.

Melquist, the second engineer (he had previously sailed many times as chief engineer—R. 574, lines 9-20), testified that at 4:10 P.M. the r.p.m.'s were at

50 (R. 576, line 1) at 4:18 P.M. the r.p.m.'s were reduced to 40 (R. 576, lines 8-9); at 4:21 P.M. the r.p.m.'s were increased to 55 (R. 576, lines 5-6); at 4:25 P.M. the r.p.m.'s were brought down to 30 (R. 576, lines 10-14). The reduction from 55 to 30 r.p.m.'s at 4:25 P.M. was four minutes after the accident occurred at 4:21 P.M.—at which time the r.p.m.'s were increased from 40 to 55. Melquist's testimony was as follows:

“Q. What, if anything, occurred with respect to the speed of the vessel and the revolutions following the change of speed to 55 r.p.m.'s? What happened after that?

A. Well, we maintained a speed of 55 r.p.m.'s, we picked it up at 4:21 *and four minutes later we received a call from the bridge to slow it down, that there was an accident, which was done.*” (R. 576, lines 22-25; 577, lines 1-3). (Emphasis supplied).

He again emphasized, “*I was told to slow her down to 30 r.p.m.'s due to an accident on deck*” (R. 576, lines 11-12). Except in an emergency in the engine room, a change in the speed of the vessel is made by the engine department only upon orders from the bridge (R. 577, lines 15-25). The reduced speed at 30 r.p.m.'s continued from 4:25 P.M. to the end of his watch at 8 P.M. (R. 579, lines 1-7).

Sarte, the A.B. who was with appellant at the time of the accident, testified without contradiction, that the speed of the vessel increased a moment before the wave struck appellant. Sarte, of Philippine extraction, has a language difficulty (R. 97, lines 12-25; 98,

lines 1-5). Yet, *he made it perfectly plain that the vessel, proceeding at reduced speed while the inspection took place, suddenly increased speed just before appellant was hurt.* This is how he stated the matter:

“Q. All right. Then did you stop at that mast house locker to do any work?

A. Well, while I was checking the dogs of the mast house locker, Mr. Maiden he checked himself the anchor chain locker. While I was checking the—*while I was checking the dogs of the mast house locker I feel the ship is moving fast, so the big wave hit * * ** So the big wave hit the bow and washed the deck. So I turn around and I see Mr. Maiden hanging on the windlass upside down.” (R. 98, line 20 to 99, line 8). (Emphasis supplied).

He emphasized the increase in the speed just before appellant was struck by stating:

“Q. Was the ship at that moment (i.e. when appellant was struck) faster than it was before you got to that point?

A. No; *while we are securing the ship she is moving slow because spray—to avoid spray so much* (R. 99, lines 12-15). (Emphasis supplied).

Q. *Did it move faster at that moment than it had been going before you got to that place?*

A. Yes.” (R. 99, lines 22-24). (Emphasis supplied).

On further examination by appellee, Sarte was more emphatic on the point. This is the exact colloquy in the record:

“Q. *And could you actually tell if the vessel’s speed changed on any given occasion when either you were aboard the ship or down on the deck?*

A. *I just feel the ship speed—moving speed because somewhat like—I feel it move fast.*

The Witness. *You can feel the movement of the boat.”* (R. 110, lines 8-17). (Emphasis supplied).

As a seaman of 12 years’ experience at the time the accident occurred (R. 89, line 21 to 91, line 5) he knew the difference between the sway of a vessel as a result of heavy weather or as the result of the action of a wave, and the way in which a vessel reacts as its speed is increased. His testimony on cross-examination was as follows:

“Q. *Never in your experience has a wave shook the ship?*

A. *Well, this move just up and down; you can feel it steady up and steady down; not that the bow is swinging like that, you know, and the same balance.*

Mr. Darwin. *May the record indicate a swinging motion of the witness’ right hand horizontally?*

The Court. *Let the record so show.”* (R. 111, lines 4-10). (Emphasis supplied).

Thus, despite his language difficulty which to some extent limited Sarte in his ability to more fully express himself, he did, nevertheless, graphically depict the action of the vessel when its speed was increased, and its consequent result in causing appellant’s injuries.

The chief mate stated that when he was on the bridge shortly before the accident the vessel was proceeding at reduced speed because of the heavy weather (R. 496, line 21 to 497, line 19). That is consistent with Sarte's testimony, who said there was only a slight spray when the inspection started at 4 P.M. It is also consistent with his testimony of the increase of the vessel's speed a moment before appellant was injured (R. 100, lines 11-16; 108, lines 17-25).

Appellant's testimony corroborated the facts above reviewed, as to the testimony of the chief mate, the second engineer, and the able-bodied seaman who accompanied appellant to the forecastle head where he was injured. He too said that when the inspection started at 4 P.M. and up to the time of the accident there were only sprays and no "green" seas (R. 149, lines 3-9). When he started the inspection, the vessel was at reduced speed and continued the same way until just before he was injured (R. 327, lines 10-17; 328, lines 2-21).

1. The deck log entry that the accident happened at "1617", i.e., at 4:17 P.M. on January 9th is wrong.

Reversal of the judgment below does *not* depend upon a resolution of any conflicting evidence, for, in essence, there is no conflict in the credible evidence. Nonetheless, it is well to analyze the testimony of one of appellee's witnesses, to demonstrate the worthlessness of his testimony.¹⁸

¹⁸See also Section VI of this brief, *infra*.

Mehallo was on the witness stand for direct and part of the cross-examination on a Friday afternoon. At that time he said, first on direct examination, that the wave, which he maintained was the cause of the accident, came over the bow "About ten minutes after 4:00 o'clock (i.e. 1610), I would say approximately" (R. 401, lines 24-25). On cross-examination that same afternoon, he said the same thing (R. 412, lines 4-5). Yet, during the intervening week end he changed his mind, for when he returned for further cross-examination on Monday morning (R. 457, line 1) and at the inadvertent prompting of appellee's proctor that the log shows the accident at 1617 (R. 461, lines 14-15), he then said that the time of the accident was 1617 (R. 461, line 24). He did so, obviously, to have it fit the engine log entry of January 9th (Resp. Ex. C at page 20), that at 1618 the revolutions were at 40—to imply that speed was reduced *before* the accident. It served his purpose to say so. Notwithstanding all the excitement that must have attended the discovery of the accident, he makes the incredible claim that the speed of the vessel could be reduced in only *one* minute! The fact is, that the accident happened at 1621 when the revolutions were *increased* to 55, as shown by the engine log, and that it took about *four minutes* during the excitement which ensued Mehallo's discovery of the accident, to slow the vessel down to 30 revolutions at 1625. It is at 1625 that Second Engineer Melquist testified *that he received a call to reduce the revolutions down to 30 r.p.m.'s because, as he was told by the bridge, an accident had occurred*

shortly before. (This matter has been discussed in another section of this brief.)

Further obvious inconsistencies in Mehallo's testimony as to the time of the accident are as follows: He testified that he made out the official "Personal Injury Report" on the day of the accident when the incident was fresh in his mind, and that it is correct, because "my mind was fresh at that time, and now it is two and one-half years. I don't recall it too well" (R. 459, lines 5-7). Significantly enough, when the matter was fresh in his mind he did state the correct time of the accident (i.e. he was only off by 1 minute), for on the official Personal Injury Report which is part of the ship's log he stated that the accident occurred at 1620 (see report attached to page 59 of Resp. Ex. B). He testified that he was *careful* when he made out that official report, and that he was not hurried or rushed at that time (R. 459, line 2 to 461, line 9).

It was only after all the officers "got together" and talked over the accident, that *he* made out the *self-serving log entry* which states the accident to have occurred at 1617. The log entry was made by Mehallo after 8:00 P.M., *almost four hours after the accident occurred*, with a sufficient opportunity to "tailor" the facts to suit his apparent need to cover up the fact that he ordered the speed increase at 4:21 P.M. (R. 461, line 25 to 462, line 6; 483, line 14 to 484, line 4).

VI. SECOND MATE MEHALLO WAS NOT A
CREDIBLE WITNESS.

It has already been stated that the official "Report of Personal Injury" is attached to the deck log (Resp. Ex. B at page 59), and as such is the official record of the time, place and circumstances of the accident.¹⁹ Item 6 on this report states:

"6. Injury sustained: (a) Date: 1/9/53 (b) Hour: 1620 (c) To whom first reported: 3rd Mate and 2nd Mate witnessed injury (d) When: 1620." (Emphasis supplied).

By an analysis of the evidence, independent of Mehallo's testimony, it has been demonstrated that the accident happened at 1621 (4:21 P.M.) on January 9th,²⁰ and differs by only one minute from the time of accident contained in the official accident report above referred to. Yet, Mehallo, as already shown, logged the accident at 1617.

Mehallo was an incredible witness for the following additional reasons, among other things:

1. He said appellant signed on the vessel with him in April, 1952 (R. 407, lines 13-22). That is not so, for appellant signed on in December, 1952 (Cl. Tr. 35, "Findings of Fact" No. 3).

2. He admitted that he at one time wrote that he did *not* witness the accident, which he then changed

¹⁹This matter has been discussed for other purposes, under Section V-B-1 of this brief, *supra*.

²⁰See Sections V-B and V-B-1 of this brief, *supra*.

by writing that he *did* see the accident (R. 474, lines 4-18).²¹

3. He said the engine was operating at *55 to 60* r.p.m.'s "on the governor" when he took over the watch at 4 P.M. on the day of the accident (R. 417, lines 6-24; 419, lines 3-12). But, the official engine log shows 50 r.p.m.'s between 12:40 P.M. (1240) and 4:18 P.M. (1618) (Resp. Ex. C at p. 20).

4. He said the accident happened 4 days after the vessel left San Francisco (R. 419, lines 21-25). The record, however, shows that it occurred on the 9th day after leaving port (Official "Personal Inquiry Report" at page 59 of Resp. Ex. B).

5. The vessel's officers charged him with failure to make official entries into the log books (R. 518, lines 17-24). In fact, he even refused to sign a statement of his own injuries, because he claimed the captain had included "certain statements there which I did not make", such as "Mr. Mehallo who was on the watch at the time failed to enter this in the bridge log" (R. 475, line 22 to 477, line 9).

6. He admitted that he was in error when he testified on direct examination as to the whereabouts of Sarte, the A.B. and the Army Sergeant at the time of the accident. He admitted the error when he was shown that his version of the accident was squarely in conflict with the testimony of Sarte and with the latter's written statement given on the day of the acci-

²¹He tried to explain it away by claiming that he made a "mistake" (R. 474, line 18).

dent (R. 411, line 4 to 413, line 4; 414, line 14 to 415, line 4; Ex. 18).

VII. APPELLANT IS PERMANENTLY DISABLED; HE WILL PROBABLY NEVER SAIL AGAIN.

Appellant's testimony as to his injuries (R. 151, line 16 to 156, line 25; 162, line 21 to 164, line 12; 335-343), his frequent in-patient hospitalizations at the Marine Hospital (R. 157, line 4 to 158, line 4; see also footnote No. 3) and the Findings of Fact Nos. 14-20, incl.; Conclusions of Law Nos. 2, 7 and 8 of the Court below (Cl. Tr. 38-41) is conclusive of the fact that the appellant will probably never sail again. In fact, the U. S. Coast Guard has revoked his seaman's papers because of his disability following his injuries on January 9, 1953 (R. 162, lines 7-20), and he is thus deprived of earning approximately \$6,000 a year (R. 158, lines 12-15).

ARGUMENT.

In the *McAllister* case, *supra*,²² the Supreme Court has limited judicial review of a judgment in an admiralty case to a consideration of the matters which a reviewing court considers upon a review of a judgment under Rule 52 (a) of the Federal Rules of Civil Procedure. The Court stated (348 U.S. at p. 20):

“A finding is clearly erroneous when ‘although there is evidence to support it, the reviewing court

²²Cited in footnote 4.

on the entire evidence is left with a definite and firm conviction that a mistake has been committed * * * ' * * * '

The instant case is one which requires a reversal, for this Court must inevitably reach the firm conclusion that, based upon a consideration of the entire evidence, a mistake has been committed by the trial court.

A recapitulation of the evidence shows:

(a) Appellant, *an experienced seaman* was not remiss in going upon the forecastle head to check (as had been done previously), and to assist in the repair, if it would have been necessary, the defective concrete at the starboard hawsepipe. Appellee's expert agreed that care required that appellant should have observed not only the hawsepipes, but also the rest of the equipment at the bow at the time of his injury. That the weather was extraordinarily rough from the day the vessel left port to the day (9 days later) when appellant was injured is undisputed. In these circumstances, it was negligent and also a breach of the warranty of seaworthiness²³ to have permitted the conditions to exist at the forecastle head which placed appellant's safety in jeopardy.

²³The libel (Cl. Tr. 4-10), combined the statement of claim for negligence with the unseaworthiness count. A suit under the *Jones Act for negligence* and under the *General Maritime Law for unseaworthiness* will lie, as one statement of claim. The Courts have held that there is but a *single wrongful invasion* of a single primary right and that, in essence, the causes of action are separate or independent, requiring no election of remedies. *Williams v. Tidewater Associated Oil Co.*, 227 Fed. 2d 791 (CA 9, 1955), cert. den. 76 S.Ct. 348; *Pate v. Standard Dredging Corp.*, 193 Fed. 2d 498 (CA 5th, 1952). See, also, *Baltimore S.S. Co. v. Phillips*, 274 U.S. 316.

(b) *The broken concrete:* The frequency of damage to the concrete at the windlass was avoidable, if appellee had used ordinary care. The first break occurred on the first day out of San Francisco. One or two days after the first break, it again required repairs. It was suggested to the chief mate that the chains, as they hung in the chain locker (Ex. 11), be lashed or triced, but he refused to do so. He admitted, and appellee's expert agreed, that if the chains had been triced, they would not have "swayed" as much and consequently would not have rubbed against the cement. Unnecessary friction would thus have been avoided, and another cause of the breakup of the concrete would have been eliminated. The concrete at the starboard side of the windlass broke badly and continued to break. Another reason for the destruction of the concrete was the defective "plug" (Lib. Ex. 12) which ultimately broke and fell into the chain locker. The plug provides the base for the pouring of the cement, to permit it to harden. When the plug fell into the chain locker, an ineffective makeshift of rags and gunnysacks had to be used, for there was no other plug aboard the vessel. The ship's carpenter said that in his long experience as a carpenter and as a bos'n on other vessels, he had never before had to use rags as a support for the concrete. Repairs were again required on January 7th and 8th and on the morning of January 9th.

(c) The cement was of *inferior quality* and that is another reason why it cracked so frequently. Not only were the wedges, i.e., "plugs", defective, but in ad-

dition, the chief mate, who was in complete charge of the operation of the vessel (subject only to the direction of the captain), said that if the vessel had carried the proper cement "we wouldn't have had any trouble at all" (R. 522, lines 22-25).

(d) *The failure to lash or trice the chains:* In view of the defective cement and the broken "plugs", good seamanship required that the chains be lashed or triced. The chief mate admitted it to be a good technique, with no danger to safety of navigation. While appellee's expert was less enthusiastic about this procedure, he did admit it would have lessened the friction of chains against concrete, which would have avoided its breakage. It was therefore negligence for the chief mate to ignore the carpenter's suggestion to lash the chains eight or nine days before the accident occurred.

(e) *The absence of catwalks or lifelines:* At the outset, lifelines and catwalks were erected as required by the official Coast Guard regulations. When the ravages of the weather destroyed them, no effort at restoration was made. The catwalk and safety line at the forecastle head which had been destroyed was never replaced. Had they been reconstructed, the appellant's serious injuries might very well have been avoided—another element of appellee's disregard for appellant's safety.

(f) *The "emergency" requiring the constant inspection of the windlass:* The weather was such from the beginning of the voyage, and particularly during the last 3 days preceding appellant's accident, as to re-

quire the standing order of the captain that no one was to go on deck except upon his or the chief mate's orders. Since the broken concrete (which could have been avoided by having good instead of defective cement available, or by having proper "plugs", or by tricing the chains), was the "chief concern" of the chief mate, inspections were ordered by him twice daily, to meet this "emergency". Except for the trouble at the windlass, the chief mate would not have sent anyone on deck on January 9th. In these circumstances, even the appellee's expert conceded that the emergent necessity brought appellant to the position of danger—which appellee could have prevented from becoming an "emergency."

(g) *Viewing the hawsepipes from in front instead of from the rear of the windlass:* It was proper, indeed unavoidable, that appellant should inspect the condition of the concrete, fore instead of aft of the windlass. In essence, there was no other way to do the job, and appellee's expert admitted that he would have done it the same way "if a person wanted to be perfectly sure" of the conditions at the hawsepipe. In view of this summary, and the analysis of the evidence under Section IV-B, *supra*, the trial court's finding (Finding of Fact No. 11, Cl. Tr. 37-38) that libelant "* * * proceeded to a point forward of the anchor windlass in a fully exposed position, with his back to an oncoming sea * * *" and that such inspection should have been made aft of the windlass, is error. To recognize such error, this Court is not confronted with the need to resolve any conflict

in testimony—for there is no conflict. The agreement of all the witnesses on this point, and the physical facts, require a contrary finding.

(h) *The chief mate's order to appellant to make the inspection at 4 P.M. on January 9th:* The court below found (Finding of Fact No. 11, Cl. Tr. 37-38) that appellant himself “was negligent to a marked degree, which negligence was the proximate and controlling cause of his injuries, in that he proceeded out on deck in violation of orders, failed to notify the bridge of his action * * *”. Here too, the court had no basis for such a finding because *all* of the evidence is to the contrary.

1. Had appellant “proceeded out on deck in violation of orders”? Sections IV-C and IV-C-1 of the brief, *supra*, show, among other things there reviewed that the chief mate ordered appellant to do the work “before it gets dark” and before 5 P.M. when the crew was to have its dinner; that appellant was not asked to wait in his room for the chief mate for the latter said he would have to relieve the third mate on the bridge some time before 4 P.M.; that notwithstanding, appellant did go to the chief mate's quarters to look for him on his way to the inspection, but the latter was then on the bridge relieving the third mate.

2. Had appellant “failed to notify the bridge of his action * * *”? The second mate established that it was the practice for the chief mate and not the unlicensed crew members to notify the bridge when a work party is due to go on deck. Furthermore,

as shown in Sections IV-C-1 and IV-C-2, *supra*, the chief mate did not always accompany the work parties. In fact, that same afternoon, two other men had done an emergency repair job without him, and the bridge was not notified. In any event, as has already been stated, it was not always the practice to notify the "bridge" of work to be done on deck.

3. Moreover, the court below wholly overlooked the evidence that the officers on the bridge had *actual knowledge* that appellant was out on the deck! In Section V, *supra*, the evidence is fully analyzed, and it shows, among other things, that not only did the chief mate *tell* the third mate of the 4 P.M. work party, but the latter actually entered it in the log and initialed the entry, although he erroneously logged the matter as 1500 (3 P.M.) instead of 1600 (4 P.M.).

(i) *Failure of the "bridge" to see appellant on the forecastle head:* In Section V and in its subsections, the analysis of the evidence fully negates Findings of Fact Nos. 7 and 8 (Cl. Tr. 36-37). A summary of the analysis of the testimony shows, among other things:

1. The ship's officers knew that appellant and others were to make the inspection at the time of the accident. The chief mate had told the third mate about it at 3:45 P.M. The latter entered it in the log. The second mate who then took over the watch must have seen the entry for he reviewed all the entries with the third mate as to the prior watch.

2. The officers on the bridge failed to observe the work party. If the watch officer had looked, the appellant would have been plainly visible at his work.

3. The captain's refusal to authorize a stand-by lookout at the starboard wing of the bridge, in accordance with customary practice in stormy and rough weather, was another reason why appellant was not seen.

4. The photographs in evidence (particularly Exs. 5, 6 and 7) show that the forecastle head is clearly visible. The chief mate said it was clearly visible from the bridge and that neither the planes on deck nor the weather impeded visibility; that anyone on the bridge could see what was going on, at the forward deck and on the foc'sle head; that, notwithstanding the "spray" from the sea, the visibility was good.

5. The second mate admitted that the bow was visible from the bridge portholes, which are shown on Ex. 8; that he had a clear view of the foc'sle head with no obstruction there (only the ship's machinery is on the foc'sle head); he did see appellant as the heavy sea, which injured appellant, hit the bow, for visibility was good; therefore if he had looked *before* appellant was injured, he would have seen him there and he would not have ordered the increase of the vessel's speed at 4:21 P.M.; that in bad weather it is customary to have an additional man on standby on the starboard wing of the bridge, but that the reason there was not one there was that the Master did not authorize an extra man; that if there had been a man there, he would have observed the starboard foc'sle head and appellant could then have been seen at work.

6. The deck diagram (Ex. 20). It was stipulated at the trial as follows:

(a) The length of the forward deck between the break of the midships house (where the bridge is located) to the ladder leading from the deck to the foc'sle head, is 111 feet.

(b) The length of the foc'sle head from the point at which the forward ladder leads to it and the furthestmost forward portion of the bow is 92 feet.

(c) The height of the eye level above the main deck (where the planes were located) as one stands looking out of the portholes on the bridge is 27 feet 6 inches.

(d) The height of the foc'sle head above the main deck is 8 feet 6 inches.

(e) The difference in the height between the bridge and the foc'sle head is 19 feet.

The deck diagram with some of the above referred to lines and dimensions drawn on it, shows that the line of vision (as one stands on the bridge and looks towards the bow), clears the mast house locker on the foc'sle head and the windless, so that appellant, when he was forward of the windless, could have been seen as he was working along the 92 foot length of the foc'sle head. Despite the planes which were lashed to the No. 2 and No. 3 hatches, the appellant, and the two others with him, should have been seen somewhere along the 111 foot length of the deck forward of the bridge, but certainly could have been seen on the foc'sle head. Based on the above measurements, i.e. item (a), 111 feet plus item (b), 92 feet, there is a distance of 203 feet of space on which the work party

was engaged in its work forward of the bridge. Ex. 2 is a photograph taken from in front of the windlass, looking toward the bridge. The bridge and its port-holes are seen. Certainly, as the chief mate admitted, the officers on the bridge should have seen appellant at the position from which the photographer had taken the photograph shown in Ex. 2.

The second mate stated that he inspected only from the port wing of the bridge. He also stated that before the accident he looked all over the vessel and could see clearly. The booms did not obstruct his view and he had a "perfect view" of the forecastle head. In the light of the foregoing review, his failure to see appellant and others, forward of the bridge, *if he had actually looked*—is incredible.

(j) *The order by the officer on the bridge to increase the speed of the vessel:* The court below in [Finding of Fact No. 9 (Cl. Tr. 37)] found that "the wave which broke over the bow was unexpected * * *" This too, is error. Again no resolution of conflict in testimony is required to demonstrate the error.²⁴ The physical facts, the uncontradicted testimony analyzed, *supra*, at Section V-B and V-B-1, the presumptions which the uncontradicted evidence support,²⁵ the reasonable inferences which the uncontradicted evidence justify upon a balance of the

²⁴Although Section VI, *supra*, is a discussion of the incredibility of second mate Mehallo as a witness, a finding that the vessel did increase its speed is justified by the record, notwithstanding such testimony.

²⁵*U.S. v. Agioi Victores*, 227 F. 2d 571 (CA 9, 1956), at page 574.

probabilities,²⁶ and the lack of any substantial evidence to support this finding²⁷ requires a reversal of this and other findings of fact and conclusions of law by which appellant is aggrieved.

The uncontroverted credible testimony of the second engineer, of the A.B. who was at the bow when the accident occurred, of the chief mate's concession that the vessel before the accident was proceeding at "reduced" speed, all of which was corroborated by appellant's testimony that just before he was injured the vessel suddenly increased its speed, the engine log entries, the accident report made out by the second mate on the day of the accident (he was "off" by only one minute when he wrote that the accident occurred at 1620 (4:20 P.M.) instead of at 4:21 P.M. when it actually happened), are further support that the accident occurred at 4:21 P.M., when the engine log shows that the engine's revolutions were increased from 40 to 55 r.p.m.'s.

The analysis of the testimony in section V-B-1, *supra*, is also conclusive on the point that the self-serving log entry prepared by the second mate, does not reflect the exact time when the accident occurred.

Finding of Fact No. 10 (Cl. Tr. 37) is not borne out by the evidence " * * * At 4:18 P.M. approximately one minute after the wave struck libelant, the vessel's engine speed was further reduced to 40 r.p.m.'s."

²⁶*Griffeth v. Utah Power & Light Co.*, 226 F. 2d 661 (CA 9, 1955)—footnote in dissenting opinion at page 679.

²⁷*Peterson v. U.S.*, 224 F. 2d 748 (CA 9, 1955).

As already shown in Section 5-B and 5-B-1, the accident occurred at 4:21 P.M. and not at 4:17.²⁸ The probabilities are that the decrease of the engine r.p.m.'s from 50 to 40 at 4:18 P.M.—3 minutes before the accident, was in order to slow down the vessel while appellant and others were probably seen by someone on the bridge at that time, and that the increase from 40 to 50 r.p.m.'s at 4:21 P.M. causing the wave to break over the bow was due to the neglect or oversight of the bridge, after appellant may have been seen at work.

Finding of Fact No. 10 continues: “* * * at 4:20 P.M. the engine’s speed was increased to 55 r.p.m.” There is *no support anywhere in the record for such a finding*, for this change occurred at 4:21 P.M.²⁹ The balance of the factual findings by the court below in Finding No. 10, is likewise erroneous, because it is based on the erroneous premises of the court below, as shown above.

Findings of Fact Nos. 12 and 13 (Cl. Tr. 38), are likewise in error, since they follow the premises already shown to be wrong in the court’s previous findings. So also with Conclusions of Law Nos. 3, 4, 5 and 6 (Cl. Tr. 41).

²⁸As shown hereafter, appellee is liable on the one hand for Jones Act (46 USC 688) negligence. On the other hand, it is also liable for the breach of the warranty of seaworthiness of the vessel, its equipment, and personnel, even if, arguendo, the wave struck at 4:17 P.M. and caused appellant’s injuries (see footnote No. 29, *infra*).

²⁹While the difference of one minute would normally be *de minimis*, in this instance it is a crucial error, because one element of the appellee’s liability is the exact time at which the increase of speed took place, causing the wave to break over the bow.

SUMMARY OF THE ARGUMENT.

The appellee and the officers of its vessel were obliged to use reasonable care for the safety of appellant and to provide him with *safe appurtenances* as well as a *safe* place in which to work. This duty was breached and, by such violation, the appellee was negligent and its vessel, its appurtenances and its personnel were unseaworthy in that:

1. Soon after the vessel left San Francisco on January 2, to the moment on January 9th when appellant was injured, the weather was rough and the conditions of the sea were extremely bad. Consequently, but principally because of inferior cement and the defective plugs, the concrete at the starboard hawsepipe of the windlass repeatedly cracked and broke down. The failure to lash or trice the chains leading into the chain locker was another cause for the constant breakdown of the concrete. When the appellant was, in these circumstances, ordered to the bow of the vessel to attend the windlass, he was unnecessarily placed in a position of hazard.

2. If the officers on the bridge had looked, or if under the circumstances of the extremely stormy weather the usual practice of providing an additional stand-by lookout on the wings of the bridge had been followed, the appellant and others would have been seen at work, the vessel would not have been speeded up, and the accident would have been avoided.

3. The failure of the vessel to provide the adequate lifesaving devices of a lifeline or a catwalk at the place of work (the evidence is clear that these safeguards had been available when the vessel left port,

but had been washed away and destroyed at sea, and were never replaced), is another reason to sustain appellant's claim.

4. The admission by the chief mate that except for the "emergency" which the appellee itself caused in creating the defective condition at the windlass, the work party would not have been sent forward on the day when appellant was injured (in view of an earlier order by the captain that no work be done on deck that day). This is another ground to afford appellant redress.

5. In addition to the foregoing acts of negligence and unseaworthy conditions of the vessel and its officers, the increase in the speed of the vessel at 4:21 P.M. while appellant and others were on the forecastle head was a disregard for his safety, for he had gone forward to attend the necessary work, upon the lawful command of an officer. The ship's officers knew or had reason to know, that appellant and others were due to perform the work at the windlass, at the time when the accident took place.

6. Appellant was not contributorily negligent in any respect by reason of his failure to notify the bridge. The prior practice for such notice, if any was required, was a duty assumed by the chief mate, who, in any event, did so notify the third mate. The evidence is also clear that the chief mate, himself, apparently did not notify the bridge when he and a work party went out to make repairs at the windlass following the accident, for there is no log entry to that effect. Therefore, there is no implication of negligence in appellants' failure to notify the bridge.

Nor can appellant be charged with negligent exposure to danger by checking the broken concrete fore, instead of aft of the windlass, since the photographs in evidence, the deck diagram (Ex. 20) and the testimony make it abundantly clear that it was proper to make the inspection in front of the windlass. Without conceding the point of any possible contributory negligence, but only for the sake of discussion, the law in Admiralty is that, even if appellant was guilty of contributory negligence, then he would be chargeable only to the extent that his negligence contributed to his injury.³⁰

7. Appellant is entitled to recover even if, for the sake of discussion, it is assumed that the vessel's speed was not increased at the time of the accident, because any one, any number, or all of the matters just stated as acts of negligence and/or unseaworthiness of the vessel, its appurtenances or its crew, warrants a recovery.

(a) Any of the above elements of appellee's fault, either alone or in combination, justifies a finding in appellant's favor, for unseaworthiness of the vessel, its equipment or its personnel.³¹

(b) The record also overwhelmingly establishes appellee's negligence. The Jones Act (46 U.S.C. Sec. 688) has had engrafted upon it, the Federal Employers' Liability Act as a part of

³⁰Appellant's negligence, if any, does not affect his right to recover for the appellee's breach of the traditional warranty of seaworthiness since appellee's liability in that regard is "a species of liability without fault". *The Osceola*, 189 U.S. 158; *Mahnich v. Southern S.S. Co.*, 321 U.S. 96.

³¹See footnote No. 30, *supra*.

the maritime law applicable herein (45 U.S.C. Sec. 51, as amended in 1939). Section 1 of the latter Act provides for liability “*in whole or in part* from the negligence of any of the officers, agents or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its * * * appliances, machinery * * * or other equipment” (Emphasis supplied).

Appellant’s injuries were caused by the *whole* series of appellee’s negligent acts above reviewed. Certainly, his present physical state was caused at the very least *in part*, by any, some, or all of those negligent acts.

The question therefore before this Court, simply stated, is whether under Admiralty Rule 46½, and under the *McAllister* case, *supra*, the record is such that the findings of the trial court should be set aside as “clearly erroneous”. Although, *arguendo*, there may be some slight evidence to support the judgment, a review of all of the evidence must logically bring this Court to the definite and firm conviction that a mistake has been committed.

McAllister case, *supra*;

States Steamship Co. v. Permanente Steamship Co., 231 F. 2d 82 at page 85 (C.A. 9, 1956);

U.S. ex rel. Accardi v. Shaughnessy, 219 F. 2d 77, at page 82 (C.A. 2, 1955).

The record is replete with credible evidence, including a virtual confession by the chief mate, supported by the credible testimony of all of the

witnesses, all of which was corroborated by the documentary proof, that the presumptions are such as to sustain appellant's position. The learned Court below failed to give appropriate weight to these presumptions.

U.S. v. Agioi Victores, 227 F. 2d 571, at page 574 (C.A. 9, 1955).

While it can not be gainsaid, as this Court has so well stated the matter in *City of Long Beach v. American President Lines*, 223 F. 2d 853 at page 855 that:

“The ghost of trial de novo in this intermediate appellate court has been laid at rest with finality in *McAllister v. U.S.*, 348 U.S. 19 * * *”

it is still necessary for this Court to consider the theories of liability urged by appellant and the conflict, if any, in the evidence. In *Pure Oil v. Union Barge Line*, 227 F. 2d 868 (C.A. 6, 1955), a collision case, tried in Admiralty, the court there considered and fully discussed the theories of liability of both sides, and found no impediment to a reversal of the lower court, at the same time acknowledging the limits established by the *McAllister* case.

This Court will still examine the record for the balance of the probabilities, to find the reasonable inferences which the totality of the credible evidence will justify.

McAllister case, *supra*, at page 22;

Griffeth v. Utah Power & Light Co., 226 F. 2d 661 (footnote on page 679 of the dissenting opinion).

The Supreme Court in *McAllister*, at page 22 said:

“Of course no one can say with certainty that the Chinese were the carriers of the polio virus and that they communicated it to the petitioner. But upon balance of the probabilities it seems a reasonable inference for the District Court to make from the facts proved * * *”.

In the instant case, even if it can not be said to be so with absolute certainty, the *balance of all of the probabilities* is such, as to lead to the reasonable inferences which sustain the appellants' cause.

CONCLUSION.

It is respectfully submitted that the portions of the judgment below, from which appellant has appealed, should be reversed.

Dated, San Francisco, California,

June 4, 1957.

JAY A. DARWIN,

Proctor for Appellant,

Louis L. Maiden.

No. 15056 ✓

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

RICHARD H. CLINTON,

Appellant,

vs.

INTERNATIONAL ORGANIZATION OF MASTERS, MATES &
PILOTS, INC., a corporation, *et al.*,

Appellees.

APPELLEE'S BRIEF.

ALLAN F. BULLARD,

1008 South Pacific Avenue,
San Pedro, California,

Proctor for Appellee.

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No. 15056
IN THE
United States Court of Appeals
FOR THE NINTH CIRCUIT

RICHARD H. CLINTON,

Appellant,

vs.

INTERNATIONAL ORGANIZATION OF MASTERS, MATES &
PILOTS, INC., a corporation, *et al.*,

Appellees.

APPELLEE'S BRIEF.

Jurisdictional Statement.

This is an appeal from a final judgment of the United States District Court for the Southern District of California, Honorable William Mathes, Judge, presiding, in an admiralty suit *in personam* by the libelant as a citizen of the State of California, for wages, maintenance, breach of contract, inducement of breach of contract, and trespass to general property rights.

The libel was cast in nine separate causes of action. The first three causes of action were stated as against this appellee, International Organization of Masters, Mates & Pilots, Inc., a New York corporation, alleging various violations of appellant's rights as a member of appellee as said rights are set forth in the constitution and by-laws of appellee.

The fourth, fifth, sixth, seventh and eighth causes of action are directed against Joshua Hendy Corporation, a California corporation, and Pacific Far East Lines, Inc., a California corporation, and allege various breaches of contract, personal injuries caused by negligence and unseaworthiness, rights to maintenance and cure, loss of wages, and wrongful inducement of breach of contract.

The ninth cause of action was directed against the State of California Employment Stabilization Commission for alleged wrongful withholding of unemployment benefits.

The libel alleges jurisdiction under 28 U. S. Code 1332, by reason of diversity of citizenship, and under 28 U. S. Code 1333 as a civil case of admiralty and maritime jurisdiction. No jurisdiction exists by reason of diversity of citizenship for the reason that complete diversity of citizenship does not exist as between the libelant, a citizen of the State of California, and all of the respondents, some of whom are also citizens of the State of California. No jurisdiction exists under 28 U. S. Code 1331, as no case is stated which arises under the Constitution, laws, or treaties of the United States.

Statement of the Case.

The appellant's libel was prepared *in pro. per.* It has proven difficult for us to analyze and comprehend the allegations of the libel. We trust that the following description of the basic allegations are reasonably accurate and fair to the appellant.

The first cause of action appears to be based on the theory that the libelant was a probationary member of appellee and was registered for work in the San Francisco office of appellee, managed by a Mr. Jackson. On March 10, 1953, Mr. Jackson dispatched the appellant on a two-

day relief mate job which libelant, as a probationary member of appellee, was not entitled to perform. While libelant was on the relief job a regular member, as distinguished from a probationary member, was dispatched on a foreign voyage. Appellant apparently claims that Mr. Jackson's action was negligent and resulted in libelant sustaining damages due to losing eighty-seven days of work and wages in the sum of \$2,262.00.

The second cause of action states that libelant became a full book or regular member of appellee in December of 1953, and thereafter was registered for work at appellee's Wilmington, California, office, managed by one Captain Durkin, and that appellant was entitled to perform relief work. It is by no means clear what happened thereafter, but we gather that libelant was disciplined by appellee's trial committee for breach of regulations in that he failed to report for work as required. Appellant claims that the discipline was wrongfully imposed, whereby he sustained damages in the sum of \$1,032.00.

The third cause of action states that appellant was restored to good standing in July of 1954, and that in September of 1954 charges were brought against him by reason of his alleged misconduct while employed on the S.S. "MARINE ARROW," owned or operated by Joshua Hendy Corporation. He was apparently found guilty of the charges and was expelled from appellee's organization. Appellant claims that his expulsion was irregular and that he has sustained damages of \$200.00 per month, and in an unknown amount, as a result.

The trial court dismissed the libel on its own motion for the reasons that no cause was stated within the admiralty and maritime jurisdiction, that no complete diversity of citizenship existed so as to sustain jurisdiction under

28 U. S. Code 1332, and that the libel did not comply with General Admiralty Rule 22 in that the libel did not propound and allege in distinct articles the various allegations of fact upon which the libelant relies in support of his suit so that the respondent or claimant may be enabled to answer distinctly and separately the several matters contained in each article.

The first cause of action of the libel had previously been made the subject matter of Case No. 27105, between the same parties, in the United States District Court for the Northern District of California. This libel was dismissed by Judge Murphy for want of jurisdiction. The order therein was filed on August 1, 1955. The appellant herein has confirmed the identity of the first cause of action in this libel with the libel in the Northern District Case No. 27105 on page 7 of his original brief or memorandum.

The second and third causes of action of the instant libel were alleged in Case No. 17955 in the Southern District of California between the same parties. These causes of action were dismissed by Judge Westover by order sustaining exceptions for want of jurisdiction entered on July 5, 1955. The identity of the second and third causes of action of this libel with the causes of action directed against appellee in Southern District Case No. 17955 is confirmed by appellant herein at page 14 of his brief. Appellant also confirms the prior disposition of all three causes of action in paragraph 1, page 1, of his document entitled "Reply to Counter Designations of Appellee, etc."

Appellant filed exceptions to the first, second and third causes of action herein on the ground of *res adjudicata*,

no appeal having been taken from the final orders of dismissal in the above designated cases. The exceptions so filed were not heard for the reason that the court dismissed all three causes of action on its own motion.

This appeal is concerned primarily with the question of existence of admiralty and maritime jurisdiction. The appellant does not specify as error the action of the trial court in dismissing the libel for failure to comply with General Admiralty Rule 22, and it would appear that this question has been finally resolved against the appellant. Presumably if the question of jurisdiction is resolved in appellant's favor by this Court the appellant may undertake to amend his libel so as to comply with General Admiralty Rule 22. As a secondary issue authorities will be cited to support the proposition that all three causes of action are barred by the principle of *res adjudicata*.

Summary of Argument.

Disputes between a maritime union and one of its members arising out of the internal administration of the union are not within admiralty and maritime jurisdiction. If such disputes are concerned with the member's status within the union and are alleged to involve breach of contract such contract is not a maritime contract. It is at most preliminary to a potential employment contract between the member and a ship operator. If such disputes involve alleged torts there is no admiralty jurisdiction unless the alleged torts occurred on navigable waters.

All three causes of action against this appellee have been finally adjudicated and each is *res adjudicata*.

ARGUMENT.

I.

Disputes Between a Maritime Union and One of Its Members Arising Out of the Administration of Internal Affairs Are Not Within the Admiralty and Maritime Jurisdiction.

It is difficult to determine whether the appellant is proceeding on a theory of breach of maritime contract or upon a theory of commission of a maritime tort. The first cause of action alleges wanton and willful misinterpretation of the union constitution and by-laws and is suggestive of an alleged tort by one of the officers or agents of appellee. Other language suggests breach of contract by the appellee. The second and third causes of action deal primarily with matters of discipline imposed upon appellant and allege wrongful conduct by a union officer or agent. The theory seems to be breach of contract, but a theory of tort cannot be ruled out.

(a) There Is No Admiralty Jurisdiction Based Upon Maritime Tort.

If the libel is based on negligence no tort within the admiralty jurisdiction is alleged as there is no allegation of any tort which occurred upon navigable waters.

Benedict on Admiralty (6th Ed.), Sec. 2, p. 2, and Sec. 127, p. 349;

Forgione v. United States (C. C. A. 2), 202 F. 2d 249, 1953 A. M. C. 323.

(b) There Is No Admiralty Jurisdiction Based Upon Maritime Contract.

Admiralty does not have jurisdiction based on contract unless the entire contract is maritime in nature. It is not sufficient to support admiralty jurisdiction that some

maritime ingredients are involved. It is not sufficient to support admiralty jurisdiction that the contract is of a preliminary nature which may lead to the execution of a maritime contract. As examples of authorities establishing these interrelated propositions we refer to:

The Ada, 250 Fed. 194. Herein the libel was upon a contract described as a charter. The charter contained a contract of sale, and one of the elements of damages claimed was for the breach of the sales contract. The District Court found that the owner had wrongfully withdrawn the chartered vessel and was liable for the losses thereby sustained by the charterer and that the damages for breach of contract were not recoverable in admiralty. On appeal the decree was reversed in its entirety on the ground that the contract was not wholly maritime. We refer to the following statement.

“Evidently the whole controversy could have been disposed of in an action at law, but the jurisdiction of a court of admiralty is confined to maritime subjects. It cannot, having obtained jurisdiction, dispose of nonmaritime subject, for the purpose of doing complete justice, after the manner of courts of equity, nor can it distribute funds in its possession, as do courts of equity and bankruptcy, among all creditors, preferred and general. Its power to dispose of the proceeds of a vessel, though it extends to the payment of nonmaritime liens, after maritime liens have been satisfied, does not extend to claims in personam or of general creditors, except so far as to pay over any surplus to the owner.”

The opinion in *The Ada*, *supra*, cites *Turner v. Bechem*, Fed. Cas. 14,252, from which the following is quoted:

“And I consider it to be a clear rule of admiralty jurisdiction that, although the contract which the

party seeks to enforce is maritime, yet, if he has connected it inseparably with another contract over which the court has no jurisdiction, and they are so blended together that the court cannot decide one, with justice to both parties, without disposing of the other, the party must resort to a court of law, or a court of equity, as the case may require, and the admiralty court cannot take jurisdiction of the controversy. The case of *Grant v. Poillon* was decided upon this ground at the last term of the Supreme Court. 20 How. 162, 15 L. Ed. 871."

The Pennsylvania, 154 Fed. 9, is also cited in *The Ada*, *supra*. The *Pennsylvania* was demised to a charterer who contracted to take young men on a nine months' sea voyage during which time they would receive a course of study. The charterer received large advances on account of the contracts but failed to prepare the vessel for the trip or to perform the contract in any respect. The vessel was libeled by the parents of the young men who were to make the trip. The libel was dismissed on the ground, as stated by the Court of Appeals, that there was no jurisdiction whatever in admiralty because the contract was one for education as well as for transportation.

The Eli Whitney, Fed. Cas. 292-A, D. C. Mass. 1947. Admiralty does not have jurisdiction over a controversy involving the breach of stipulations, conditions, and representations leading to the execution of a charter party but not contained within it.

Kaufman v. John Block Co., 60 Fed. Supp. 992. Admiralty does not have jurisdiction over a cause of action based upon misconduct of corporation officers in wrongfully issuing bills of lading for carriage by sea.

The Harvey and Henry, 86 Fed. 656. Admiralty does not have jurisdiction over a contract for soliciting cargo and freight, as such is only preliminary to the possible execution of subsequent maritime contracts. "The distinction between preliminary services leading to a maritime contract and such contracts themselves has been affirmed in this country from the first." *The Thames*, 10 Fed. 848. An insurance broker's contract to procure insurance upon a vessel for a contemplated voyage is not maritime. *Marquardt v. French*, 53 Fed. 606. Neither is a freight agent's contract to solicit freight, nor a ship broker's contract to secure a charterer for a ship. *The Crystal Stream*, 25 Fed. 575; *Torices v. The Winged Racer*, 39 Hunt, Mer. Mag. 458, Fed. Cas. No. 14,102; Benedict on Admiralty, Sec. 212. "Undertakings which are merely personal in their character, or which are preliminary or leading to maritime contracts do not seem ever to have been recognized as within the admiralty jurisdiction." *Cox v. Murray* (Betts, J.), Abb. Adm. 342, Fed. Cas. No. 3-304. In *Plummer v. Webb*, 4 Mason 388, Fed. Cas. No. 11,233, Judge Story says: "In cases of a mixed nature it is not a sufficient foundation for admiralty jurisdiction that there are involved some ingredients of a maritime nature. The substance of the whole contract must be maritime." See also *Diefenthal v. Steamship Co.*, 46 Fed. 397, and cases there cited."

Goumas v. Karras, S. D. N. Y. 51 Fed. Supp. 145, affd. 140 F. 2d 157.

In this case the Second Circuit Court of Appeals affirmed a decision of the trial court dismissing a libel on exceptions for want of jurisdiction. The libelant was a ship chandler and provided a crew for the respondent's vessel. The crew found the ship uninhabitable and re-

fused to serve. The libelant incurred expenses in connection with the crew's charges for transportation, maintenance, and other related matters. The trial court relied in part upon *Cory Bros. v. United States*, 51 F. 2d 1010, cert. den. 278 U. S. 632, and quoted from Judge Swan's opinion as follows:

"If the contract merely employed libelant to procure maritime services instead of obligating it to perform them itself, it may well be that a suit to recover compensation and disbursements would be not of maritime cognizance. Such a distinction has been frequently observed. Thus, while a contract for the charter of a ship is clearly maritime in nature, a contract creating an agency to obtain charterings has been held nonmaritime. (Citing cases.) * * * The same has been held as to a contract with an agent to procure crews. *The Retriever*, 93 Fed. 480 (D. C. W. D. Wash); insurance on a ship, *Marquardt v. French*, 53 Fed. 603 (D. C. S. D. N. Y.); freight and passengers (citing cases), * * *. The rationale has been thus stated: 'That distinction between preliminary services leading to a maritime contract and such contracts themselves has been affirmed in this country from the first, and not yet departed from. It furnishes a distinction capable of somewhat easy application. If it be broken down, I do not perceive any other dividing line for excluding from the admiralty many other sorts of claims which have a reference, more or less near or remote, to navigation and commerce. If the broker of a charter-party be admitted, the insurance broker must follow—the drayman, the expressman, and all others who perform services having reference to a voyage either in contemplation or executed.' Brown, J., in the *Thames* (D. C.), 10 Fed. 848. See, also, the *Harvey and*

Henry, 86 Fed. 656 (2 C. C. A.); 1 Benedict, Admiralty (5th Ed.), sec. 62. Apparently the same ground explains the decision in *Minturn v. Maynard*, 58 U. S. 477, 15 L. Ed. 235, where the libellant had been employed by the shipowner as general agent and had expended money for supplies, repairs, and advertising of the ship. The suit was for disbursements and commissions, and it was held that the agent's remedy was not a libel in admiralty but a suit in assumpsit. (Citing cases.) * * *." (1931 A. M. C. 1445.)

Giving the appellant every benefit of doubt, his libel against this appellee falls within the principles stated in the above citations. His status as a union member has only a remote and preliminary bearing upon any maritime services or contracts to which he might become a party. It may be that by maintaining his union status the appellant would be employed by maritime employers pursuant to contracts negotiated by the appellee. The terms and conditions of appellant's membership in the appellee would have no bearing upon the terms and conditions of his subsequent employment in a seafaring capacity. It might equally well be that if appellant were employed as a mate on a vessel he would require his own sextant and pocket chronometer. If he had purchased these items under a conditional sales contract certainly that contract would not be within the admiralty and maritime jurisdiction because of the end results which might be accomplished by their use, and the same principle applies to the terms and conditions of his membership in appellee. The supplying of fishermen bound on a fishing voyage with necessary articles for the voyage is not a maritime transaction.

The *Mary F. Chisholm*, 129 Fed. 814.

A large number of similar contracts which have a sea-going background but which are nonmaritime for the purpose of conferring admiralty jurisdiction are collected and described in *Benedict on Admiralty* (6th Ed.), Sec. 67, p. 138, *et seq.*

There are many organizations and associations which are primarily interested in maritime matters, of which the Propeller Club of the United States, the Maritime Law Association of the United States, and the various associations of sport authorities, are examples. The relationships between such associations and their members, while maritime in flavor, would not give rise to causes of Admiralty jurisdiction because of the salty background of the personalities involved. If the admiralty should extend its jurisdiction to a case such as this it would open the door to a flood of causes which have nothing to do with maritime matters directly but which only remotely affect navigation and commerce. If admiralty should extend its jurisdiction to problems between a seaman and his union it would logically be expected to exercise jurisdiction over the seaman's problems with his pawnbroker or with the seaman's attempts to recover wages lost to a B-girl in a waterfront bistro.

Judge Murphy's order in *Clinton v. Masters, Mates & Pilots, etc.*, Northern District of California Case No. 27105 is an able judicial evaluation of the first cause of action included in the instant case. It is equally applicable to the second and third causes of action. That order is as follows:

"Libelant, a seaman, brings this suit under the provisions of 28 U. S. C., sec. 1916. This libel is difficult of interpretation, but the gravamen thereof seems to be that libelant was a member of respondent union,

that an officer or agent of said respondent union 'wanton and wilfully through his negligent interpretation of the union constitution, rules and by-laws, dispatched libelant to a temporary job, promising him a preferred position with respect to other jobs that might become available after the completion of the temporary assignment, but that said agent failed to do so.' Libelant's statement of facts lends itself to a theory of negligence by a union officer, or breach of contract by the union.

"On neither of these theories is there any action within the admiralty jurisdiction of this Court. This is a dispute between a member of the union and the union, or a union officer, all residents of California, with respect to certain rights of the union member under the terms of membership, and, conceivably, a separate agreement made between the member and the union. This is not a maritime case. The mere fact that the libelant is a seaman does not convert his disputes into maritime contracts or maritime torts such as to confer admiralty jurisdiction upon this Court. Accord, *Warner v. The Bear*, 126 F. Supp. 529 (D. C. Alaska 1955); *D. C. Andrews & Co. v. United States*, 124 F. Supp. 362 (Ct. Clms. 1954); *Grank Banks Fishing Co., Inc. v. Styron*, 114 F. Supp. 1 (S. D. Maine 1953); *Goumas v. Karras*, 51 F. Supp. 145 (S. D. N. Y. 1943).

"Respondent's motion to dismiss is therefore granted. Dated: July 13th, 1955."

II.

The Subject Matter of This Appeal Is Res Adjudicata.

Each of the three causes of action stated against this appellee have been previously dismissed on the hearing of exceptions for want of jurisdiction, as more specifically appears from appellee's Statement of the Case. No appeal was taken from the orders of dismissal, and the orders have become final.

Ordinarily, *res adjudicata* does not apply in the absence of a prior hearing on the same subject matter between the same parties on the merits. All that is determined upon such a disposition is that as between the parties the cause of action pleaded is not within the jurisdiction of the court. The libelant is free to start again and allege additional facts which are sufficient to establish jurisdiction. The appellant herein has not chosen to follow this course. He has elected to file a series of libels in several of the District Courts of this Circuit, realleging in each instance the same facts previously alleged in libels dismissed for want of jurisdiction.

In this situation, where the same facts and the same issues have been once presented between the same parties and the libel dismissed for want of jurisdiction the principle of *res adjudicata* does apply.

Hicks v. Holland (C. C. A. 6), 235 F. 2d 183;

Hedger, etc. v. Bushey, etc. (C. C. A. 2), 186 F. 2d 236.

We respectfully submit that the judgment of dismissal in the court below should be affirmed.

Respectfully submitted,

ALLAN F. BULLARD,

Proctor for Appellee.

No. 15,070 ✓

IN THE
United States Court of Appeals
For the Ninth Circuit

TERRITORY OF ALASKA,

Appellant,

VS.

AMERICAN CAN COMPANY, FIDALGO ISLAND
PACKING COMPANY, LIBBY, McNEILL &
LIBBY, INC., NAKAT PACKING COMPANY,
NEW ENGLAND FISH CO., P. E. HARRIS
COMPANY, INC., PACIFIC & ARCTIC RAIL-
WAY & NAVIGATION Co., and OCEANIC
FISHERIES Co.,

Appellees.

Upon Appeal from the District Court for the
Territory of Alaska, First Division.

APPELLANT'S OPENING BRIEF.

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I.

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No. 15,070

IN THE

**United States Court of Appeals
For the Ninth Circuit**

TERRITORY OF ALASKA,

Appellant,

VS.

AMERICAN CAN COMPANY, FIDALGO ISLAND
PACKING COMPANY, LIBBY, MCNEILL &
LIBBY, INC., NAKAT PACKING COMPANY,
NEW ENGLAND FISH CO., P. E. HARRIS
COMPANY, INC., PACIFIC & ARCTIC RAIL-
WAY & NAVIGATION Co., and OCEANIC
FISHERIES Co.,

Appellees.

Upon Appeal from the District Court for the
Territory of Alaska, First Division.

APPELLANT'S OPENING BRIEF.

OPINION BELOW.

The opinion of the District Court is reported in 137
F. Supp. 181.

JURISDICTION.

This suit is a consolidation of eight actions (R. 25,
44) brought by the appellant to recover taxes, interest
and penalties from all of the appellees for the years

1949, 1950, 1951 and 1952 under the provisions of the Alaska Property Tax Act, Chapter 10, Session Laws of Alaska, 1949, as amended by Chapter 88, Session Laws of Alaska, 1949 and repealed by Chapter 22, Session Laws of Alaska, 1953. An order was entered on January 21, 1956 incorporating therein the Court's written opinion and dismissing appellant's complaint against each appellee. (R. 69.) An appeal was taken on February 7, 1956, by filing with the District Court a Notice of Appeal. (R. 70.) The jurisdiction of the District Court was invoked under the Act of June 6, 1900 c. 786, §4, 31 Stat. 322, as amended, 48 U.S.C.A., §101. The jurisdiction of this Court rests on §1291 of Title 28, United States Code, Judiciary and Judicial Procedure.

STATEMENT.

1. In 1949 the Alaska Territorial Legislature enacted the first general property tax act of the Territory, being Chapter 10, Session Laws of Alaska, 1949. This particular enactment, known as the "Alaska Property Tax Act" has been the subject of litigation on several previous occasions. In 1950, an attempt was made to restrain the collection of the tax. Although the trial Court held the law to be invalid and granted an injunction, upon appeal this Honorable Court held the remedy was not in equity, but by an action at law and, therefore, reversed the lower Court. *Hess v. Mullaney*, 91 F. Supp. 139, reversed in *Mullaney v. Hess*, 189 F2d 417. Thereafter, the same taxpayers paid the subject tax under protest and insti-

tuted a new action. The lower Court held the Act to be valid and dismissed the Complaints filed by the taxpayers. *Hess v. Mullaney*, 102 F. Supp. 430. The opinion was sustained by this Honorable Court in *Hess v. Mullaney*, 213 F2d 635.

2. In 1953 the Alaska Property Tax Act was repealed by Chapter 22, Session Laws of Alaska, 1953 by the Legislature's overriding the veto of former Governor Ernest Gruening.

3. Between April and May of 1955, the appellant filed eight separate Complaints seeking to recover a total amount of over one-hundred and seventy-five thousand dollars (\$175,000.00) in taxes, interest and penalties which had accrued and were due and owing by the appellees for the years 1949, 1950, 1951 and 1952. (R. 3, 8, 14, 19, 25, 29, 33 and 37.)

4. On either the last day or the day before the last day within which to answer appellant's Complaints, each appellee filed a separate, identical Motion to Dismiss, alleging:

“(1) That the Complaint does not state a claim against the defendant upon which relief can be granted.

“(2) That the action was not brought within the time required by law.” (R. 6, 11, 17, 22, 28, 32, 36 and 40.)

5. On May 5, 1955, the appellant filed a counter motion against four of the appellees requesting that the United States District Judge enter “an order (1) striking the motion to dismiss filed by the defendant, and (2) requiring the defendant to answer the com-

plaint within 10 days thereafter.” Appellant listed the following reasons for its motion:

“1. That defendant’s motion to dismiss fails to state the grounds therefore with particularity as is required by Rule 7 (b), Federal Rules of Civil Procedure.

“2. That the Statute of Limitations may not be raised on a motion to dismiss the complaint.

“3. That the motion to dismiss is a dilatory pleading.” (R. 7, 12, 18 and 23.)

At the hearing on appellant’s Motion to Strike, the second ground was abandoned in view of *Suckow Borax Mines Consolidated, Inc. v. Borax Consolidated, Limited*, 185 F2d 196, 202, (9th Cir.). (R. 41.)

Appellees’ principal argument in answer to appellant’s contention that Rule 7 (b) had not been complied with was that their Motion to Dismiss conformed to Form 19 of the Appendix Forms to the Federal Rules of Civil Procedure and was therefore stated with the sufficient particularity. The late Honorable George W. Folta sustained appellees’ argument and denied appellant’s Motion to Strike, holding that:

“Although it can hardly be said that the matter is free from doubt, *Munson Line v. Green*, 6 F.R.D. 470, 474, it would appear that under the cases cited supra the court is warranted in holding that Form 19 is sufficient to meet the requirements of Rule 7, 2 Moore, 2265-6, Sec. 12.14. * * *” (R. 42.)

The District Judge went on to also comment that:

“Undoubtedly, since a contrary holding would eliminate surprise and delay and thus conduce to

the administration of justice, I am convinced that this Court should, in the interest of justice, adopt a rule in conformity with that existing in most federal jurisdictions requiring the movant to submit a brief or memorandum in support of his motion.” (R. 42.)¹

6. The appellees’ Motions to Dismiss were consolidated for hearing, (R. 25, 44) and the Court convened on October 28, 1955, and heard arguments by H. L. Faulkner, R. E. Robertson and W. C. Arnold for the appellees, and Henry J. Camarot, Assistant Attorney General, for the appellant. (R. 46.)

7. In the course of the hearing, the following offer of proof was made by appellant’s attorney, together with the Court’s statement of rejection:

“The Court. Will you make your offer again, counsel?

Mr. Camarot. If the Court please, when the defendants argued their motions to dismiss, they

¹In the Uniform Rules of the District Court for the District of Alaska, effective January 28, 1956, the District Judges promulgated this new local procedural rule:

“Rule 5. Motions and Matters Other Than Trials on the Merits.

* * *

(d) Requirements for Submission:

(1) There shall be served and filed with the notice of motion or other application and as a part thereof, * * *

(b) a brief, complete, written statement of all reasons in support thereof, together with a memorandum of the points and authorities upon which the moving party will rely. Each party opposing the motion or other application shall (a), within five days after service of the notice thereof upon him, serve and file a brief, complete, written statement of all reasons in opposition thereto and an answering memorandum of points and authorities, or a written statement that he will not oppose said motion,

* * *

recognized the general repealer clause, Section 19-1-1. However, they stated that they were of the opinion that Chapter 22, S.L.A. 1953, and particularly Section 2 (a), was a special repealer clause which necessarily made an exception to the general repealer clause, and, therefore, all taxes that would have been due and owing to the Territory of Alaska prior to 1953 would be null and void.

The Territory wishes at this time to call the Court's attention to the fact that Section 2 (a) of Chapter 22——

The Court. Counsel, I understood you were not to argue this point, but you may introduce this evidence here.

Mr. Camarot. I just want to give the background, if the Court please, so it will be clear in the record.

The Court. Very well.

Mr. Camarot. The Territory of Alaska, plaintiff, wishes to call to the Court's attention that Section 2(a) is not in fact merely a special repealer clause but, rather, adds an extra ingredient and, really, advantage to the municipalities, school or public utility districts who may be involved in that it permits them to levy and assess during the current fiscal year, which could be beyond the year 1952 and to the year 1953, an additional assessment. The Territory was completely prohibited from levying any taxes after 1952.

In further support that this was the intent of the Legislature I would like to introduce House Bill No. 3,² which contains a provision to the

²House Bill No. 3 reads as follows:

“Section 1. That Chapter 10, Session Laws of Alaska, 1949, as amended by Chapter 88, Session Laws of Alaska, 1949, be and it is hereby repealed.

effect 'That all accrued and unpaid taxes on real property and improvements, and personal property, boats and vessels, levied under the provisions of Chapter 10, S.L.A. 1949, are hereby cancelled, repealed and abrogated, and declared null and void.' And I proffer this particular evidence to show the intent of the Legislature was not to permit the cancellation of all taxes due and owing prior to 1952 in that they specifically omitted this particular section. There is no question this particular section was included in the original House Bill which was introduced, and I call to the Court's attention that the final act which is in the regular Session Laws completely omits that phrase which cancels all previous taxes.

The Court. You have made your offer. I understand the defendants object.

Mr. Arnold. For the grounds previously stated we object, your Honor.

Mr. Camarot. If the Court please, I don't know that the grounds previously stated will show in the record.

The Court. Well, it is not necessary. This matter is before the Court upon a motion to dismiss the complaint of plaintiff in these several cases, consolidated, upon the grounds that it fails to state a claim under the Federal Rules of Civil Procedure. In such a hearing we cannot introduce evidence of something other than the acts

Section 2. That all accrued and unpaid taxes on real property and improvements, and personal property, boats and vessels, levied under the provisions of Chapter 10, Session Laws of Alaska, 1949, as amended by Chapter 88, Session Laws of Alaska, 1949, are hereby cancelled, repealed and abrogated, and declared null and void.

Section 3. An emergency is hereby declared to exist and this act shall be in full force and effect for and after the date of its passage and approval." (R. 55.)

of the Legislature or such matters as Journal entries, of which the Court could take judicial notice, indicating any such intent or indicating the question of intent. We can hear only tests and sufficiency of the complaint, for which reason the offer to introduce this exhibit of the House Bill, which was not passed, as I understand it, by the Legislature, must be denied. I might add that, even if admitted, from the statement of counsel such bill would not bear out counsel's contention." (R. 46-48.)

8. On January 21, 1956 the District Court granted appellees' Motion to Dismiss the Complaint (R. 69) for the reasons stated in its opinion. (R. 56.) This appeal followed. (R. 70-76.)

QUESTIONS PRESENTED.

1. Whether the Alaska Property Tax Act (Chapter 10, Session Laws of Alaska, 1949) directing that "every person shall be assessed and taxed annually on his property" is a tax on the appellees for which they are personally liable or merely a tax on their property.

2. Whether the appellant is without a remedy to collect and enforce taxes due and owing under the Alaska Property Tax Act.

3. Whether the language in Chapter 22, Session Laws of Alaska, 1953, the Act repealing the Alaska Property Tax Act is a so-called special savings clause having the effect of voiding and nullifying appellant's right under the Territorial General Savings Clause

(Section 19-1-1 ACLA 1949) to collect accrued and unpaid taxes for the years 1949, 1950, 1951 and 1952.

4. Whether, in interpreting a particular statute, (Chapter 22, Session Laws of Alaska, 1953) the terms and expressions of which are ambiguous, the Court is limited in ascertaining the legislative intent to only those statutory constructional aids of which it may take "judicial notice" or whether it may refer to extrinsic aids, otherwise admissible under the laws of evidence, which bear directly on such intent.

STATUTES INVOLVED.

Chapter 10, Session Laws of Alaska, 1949, the Alaska Property Tax Act, appears in the Appendix, *infra*, Appendix "A", pp. 1-28.

Chapter 22, Session Laws of Alaska, 1953 repealing Chapter 10, Session Laws of Alaska 1949, as amended:

"Section 1. That Chapter 10, Session Laws of Alaska, 1949, as amended by Chapter 88, Session Laws of Alaska, 1949, be and it is hereby repealed.

Section 2. Section 1 of this Act shall not be applicable to:

- (a) any taxes which have been levied and assessed by any municipality, school or public utility district under the provisions of Chapter 10, Session Laws of Alaska 1949, as amended, or which are levied and assessed during the current fiscal year of such mu-

municipality, school or public utility district;
and

- (b) any exemptions from the taxes referred to in subsection (a) of this section, which have been granted under the provisions of Section 6 (h) of Chapter 10, Session Laws of Alaska 1949.

Section 3. An emergency is hereby declared to exist and this Act shall be in full force and effect for and after the date of its passage and approval.”

Section 19-1-1 Alaska Compiled Laws Annotated, 1949, the Alaska General Savings Clause, (as amended by Chapter 4, Extraordinary Session Laws of Alaska, 1955):

“19-1-1. Effect of repeals or amendments. The repeal or amendment of any statute shall not affect any offense committed or any act done or right accruing or accrued or any action or proceeding had or commenced prior to such repeal or amendment; nor shall any penalty, forfeiture or liability incurred under such statute be released or extinguished, but the same may be enforced, continued, sustained, prosecuted and punished under the repealing or amendatory statute save as limited by the ex post facto and other provisions of the Constitution, in which event the same may be enforced, continued, sustained, prosecuted and punished under the former law as if such repeal or amendment had not been made. * * *”

Section 2-1-2 Alaska Compiled Laws Annotated, 1949:

“§2-1-2. Applicability of common law. So much of the common law as is applicable and not inconsistent with the Constitution of the United States or with any law passed or to be passed by Congress or the Legislature of Alaska is adopted and declared to be law in the Territory of Alaska.”

SPECIFICATION OF ERRORS.

The points in the above appeal upon which appellant relies are as follows:

(1) The Court erred in granting the appellees' Motion to Dismiss the Complaint.

This is error since the Complaint did state a claim upon which relief can be granted in that Territorial law specifically permits recovery of the real and personal property taxes sought therein.

(2) The Court erred in holding that a personal action would not lie against each of the appellees for the recovery of the taxes involved.

This is error since Section 12 of Chapter 10, S.L.A., 1949, and other Sections therein, decree that the “person” is to be “assessed and taxed”.

(3) The Court erred in holding that the accrued and unpaid taxes due and owing under Chapter 10, S.L.A., 1949, by the appellees to the appellant for the years 1949, 1950, 1951 and 1952 were cancelled and excused by Chapter 22, S.L.A., 1953.

This is error: (a) Since Chapter 22 and the legislative history surrounding the passage of this Act indicates the accrued and unpaid taxes for the years 1949, 1950, 1951 and 1952 were not to be cancelled or excused; and (b) Since the cancellation or excusing of such taxes would create an unjust result as to those taxpayers who in good faith have paid the said tax.

(4) The Court erred in refusing to consider pertinent evidence of legislative history which, if considered, would show the true legislative intent and statutory construction to be placed on Chapter 22, S.L.A., 1953, i.e., that unpaid taxes levied by Chapter 10, S.L.A., 1949, were not intended to be cancelled or excused by the Legislature.

This is error since the rejected evidence would have clearly shown that the legislative intent and intended statutory construction is contrary to the District Court's holding and that the payment of said taxes were not excused by the Legislature.

(5) The Court erred in rejecting the introduction into evidence of both the original House Bill No. 3 and Senate Bill No. 5, Twenty-first Session, Territory of Alaska Legislature.

This is error since the original House Bill and the Senate Bill which by their plain language would have excused the accrued taxes for the specific years involved, were unqualifiedly rejected by both houses and therefore clearly manifest a legislative intent not to excuse the payment of said back taxes.

(6) The Court erred in holding that the Territory's General Savings Clause (Section 19-1-1 ACLA 1949)

is in irreconcilable conflict with the alleged "specific savings clause" of Section 1 of Chapter 22, S.L.A., 1953.

This is error since the Territory's General Savings Clause and the alleged specific savings clause in Chapter 22, are in complete harmony and easily reconcilable.

(7) The Court erred in holding that the appellant is without remedy to collect and enforce the taxes accruing to the appellant under Chapter 10, S.L.A., 1949.

This is error in that: (a) Chapter 10, S.L.A., 1949, expressly authorizes the collection and enforcement of taxes by property foreclosure; and (b) the common law, which is expressly made applicable to Alaska by Territorial statute, authorizes the collection of taxes by appropriate in personam proceedings where the taxpayer is personally liable.

SUMMARY OF ARGUMENT.

I.

A. THE ALASKA PROPERTY TAX ACT IS A TAX ASSESSED AND LEVIED AGAINST THE TAXPAYER FOR WHICH HE IS PERSONALLY LIABLE AND, ACCORDINGLY, AN ACTION IN THE NATURE OF ASSUMPSIT OR DEBT WILL LIE TO RECOVER THE PAYMENT OF ALL ACCRUED AND UNPAID TAXES THEREUNDER.

1. The Alaska Property Tax Act specifically imposes a personal obligation on the "taxpayer" who is "assessed and taxed".

2. Where a taxpayer is personally liable to pay a tax an action for the recovery thereof will lie.

3. The case of *City of Yakutat v. Libby, McNeill & Libby*, cited by the District Court as controlling precedent does not support the Court's conclusion.

II.

A. SECTION 2 OF CHAPTER 22, SESSION LAWS OF ALASKA 1953, THE ALLEGED SPECIAL SAVINGS CLAUSE, HAS A REASONABLE PURPOSE WHICH IN NO WAY INFRINGES UPON THE TERRITORY'S GENERAL SAVINGS CLAUSE, SECTION 19-1-1 ACLA 1949, AS AMENDED, AND THEREFORE, BOTH STATUTES SHOULD HAVE BEEN READ IN PARI MATERIA.

1. Even if it be assumed that Section 2 of Chapter 22, SLA 1953 were a special savings clause, it could not nullify the continuing rights and liabilities saved under a general savings clause if such was not the intention of the Legislature.

B. ONCE IT WAS DETERMINED AND ESTABLISHED THAT AN AMBIGUITY EXISTS IN THE STATUTE (CHAPTER 22, SLA 1953), THE COURT WAS UNDER A DUTY TO MAKE USE OF ALL AVAILABLE INTERPRETATIONAL AIDS TO DETERMINE THE TRUE MEANING AND INTENT OF THE STATUTE.

1. Because of the particular circumstances existing in Alaska, the Court should consider any and all extrinsic aids which will help ascertain and establish the true legislative intent in passing

Chapter 22, SLA 1953, and not limit itself to only those matters of which it can take judicial notice.

2. Because of the ambiguity of the statute and the direct bearing on the legislative intent, the Court should have considered the bill originally introduced and the amendments thereto, which preceded the final adoption of Chapter 22, SLA 1953.

ARGUMENT.

PRELIMINARY CONSIDERATION.

At the outset of this important case, appellant deems it essential to briefly reconstruct the procedural background against which the appellees' Motion to Dismiss was heard.

A positive effort had been made to have the appellees state with particularity the premises upon which they predicated their motions. (R. 7, 12, 18, 23.) The attempt was defeated by the District Court agreeing with appellees that official Form 19, appearing in the Appendix to the *Federal Rules of Civil Procedure*, was sufficient compliance with Rule 7 (b). (R. 40.) As a direct result of this ruling appellant was unaware on which particular theory of law the appellees would embark to substantiate their assertion that the Complaint did not state a claim upon which relief could be granted.³ Nor was it revealed until the hear-

³The bare statement "that the complaint does not state a claim against the defendant upon which relief can be granted" is nothing more than a general demurrer (Volume 2, *Moore's Federal Practice*, 1512, Section 7.05). A type of pleading which has been

ing when appellees announced they were basing their argument on the contention that Section 2 of Chapter 22 SLA 1953 was equivalent to a "special savings" clause and, therefore, voided the application of the Territory's General Savings Clause, (Section 19-1-1 ACLA 1949, as amended.) Because of the inability to anticipate the many legal bases that appellees might lean towards in support of their Motion, appellant was a victim of the "sporting theory" of justice, see 41 *Mich. Law Review*, 224; 38 *Columbia Law Review*, 1436, and an opportunity to present a full oral argument predicated on preliminary research and adequate preparation was denied.⁴

However, rather than specify the above as error and detract from the grave substantive questions presented herein, appellant deemed it more appropriate and equally effective to merely call these procedural events to this Court's attention as one more cumulative fact to be weighed in considering the case as a whole.

The District Court erred as a matter of law in dismissing the Complaints, because:

abolished under the Federal Rules. See Rule 7(c) and *Tobin v. Chambers Construction Co.*, D.C. Neb. 1952, 15 F.R.D. 47; *Smedley v. Guy F. Atkinson Co. et al*, D.C. Neb. 1951, 12 F.R.D. 355.

⁴As stated previously in Footnote 1, page 5, the newly promulgated local Uniform Rules of the District Court for the District of Alaska now make it an indispensable requirement that the issues be defined by both parties submitting "a brief, complete, written statement of all reasons in support" of their Motion "together with a memorandum of the points and authorities" upon which they rely. See Rule 5 (d) *supra*.

I.

A. THE ALASKA PROPERTY TAX ACT IS A TAX ASSESSED AND LEVIED AGAINST THE TAXPAYER FOR WHICH HE IS PERSONALLY LIABLE AND, ACCORDINGLY, AN ACTION IN THE NATURE OF ASSUMPSIT OR DEBT WILL LIE TO RECOVER THE PAYMENT OF ALL ACCRUED AND UNPAID TAXES THEREUNDER.

At the conclusion of the oral argument on the Motion to Dismiss and before leaving the Bench, the District Judge summarily held that no personal action would lie against the appellees for recovery of the accrued and unpaid taxes involved and that the Complaints involving over \$175,000.00 were therefore subject to immediate dismissal. This holding was predicated on the Court being of the early view that there was no "remedy to bring a suit for individual liability" under the provisions of Chapter 10, Session Laws of Alaska, 1949, as amended. (R. 50.)

In the subsequent written opinion filed by the lower Court it confirmed its previous oral holding stating: " * * * This issue has been squarely determined against the plaintiff (Appellant) by the District Court for this Division in the case of *City of Yakutat v. Libby, McNeill & Libby*, 13 Alaska 378, 98 F. Supp. 101 * * *" (R. 58.)

Appellant's position throughout has been that the taxes that accrued and are now owing under the Alaska Property Tax Act are a personal obligation, for which a remedy therefor lies, and are, in addition, a charge against the taxpayers' property. In support of this assertion, appellant submits the following propositions:

1. The Alaska Property Tax Act specifically imposes a personal obligation on the "taxpayer" who is "assessed and taxed".

2. Where a taxpayer is personally liable to pay a tax an action for the recovery thereof will lie.

3. The case of *City of Yakutat v. Libby, McNeill & Libby*, cited by the District Court as controlling precedent does not support the Court's conclusion.

1. **The Alaska Property Tax Act** specifically imposes a personal obligation on the "taxpayer" who is "assessed and taxed".

To properly determine whether appellees are personally liable to pay the accrued and unpaid taxes herein, it is necessary to examine the pertinent provisions of the Alaska Property Tax Act. (Chapter 10, Session Laws of Alaska 1949, as amended, reprinted in full in the Appendix on pages 1-28.) The Sections upon which the appellant principally relies are:

(a) Section 9, which empowers the assessor to make an independent investigation of any person "liable to assessment";

(b) Section 12, which provides that "Every person shall be *assessed and taxed* annually on his property in the division in which the property is situated, * * *"; (Emphasis added.)

(c) Section 13 which declares that

"* * *(d) Where the property assessed is owned by two or more persons in undivided shares, each owner shall be assessed on the undivided interest at the pro-

portion of the assessed value of the property that his undivided interest bears to the whole.”;

(d) Section 14 which places the duty upon the assessor of each division to prepare an “* * * annual assessment roll * * * covering property *outside* of municipalities and school districts and public utility districts, * * *” and to include thereon: “* * * the arrears of taxes *owing by any persons*; * * *” (Emphasis added.)

(e) Sections 15, 17, 22, 25, 30 and 37, all of which show a use and re-use of the descriptive noun “taxpayer” when referring to his rights, duties or liabilities.

(f) Section 25 which provides that: “Any person whose name appears on the assessment roll * * * or who is assessed * * * may appeal to the Board” of Assessment and Equalization “with respect to any alleged overcharge, * * * ”.

The word “assessment”, when used in tax acts, has admittedly not been employed in a consistent manner. It has been regarded as having both a broad and a narrow meaning dependent on the context of the statute as a whole. It has often been used as a synonym for “taxation”. In *Black’s Law Dictionary*, Third Edition, “assessment” is defined, in its general sense, as denoting “the process of ascertaining and adjusting the shares respectively to be contributed by several persons towards a common beneficial object according to the benefit received.” In *Abrams, et al. v. City and County of San Francisco*, 119 P2d 197,

199, it was held that “assessment” means (a) listing persons properly to be taxed, and (b) estimating the sums which are to be the guide of the apportionment of the tax between them.

Section 9 of the Alaska Property Tax Act refers to the “person * * * liable to assessment”. When used in this setting it is perfectly apparent that the “person * * * liable to assessment” is the taxpayer who is subject to the tax liability or charge.

That the taxes are, in fact, assessed or taxed against the owners thereof, is decidedly clear when Section 12 of the Act is examined. This Section, under the heading “Assessment”, among other things, unequivocally directs that: “Every person shall be *assessed and taxed* annually on his property”. (Emphasis supplied.) Accordingly, even if the argument is made by appellees that “assessment” is not to be accepted as synonymous with “taxation” under Section 12, it is inescapable that the “person” is to be initially “assessed” and then “taxed”.

As noted above, Section 13 (d) declares that:

“(d) Where the property assessed is owned by two or more persons in undivided shares, *each owner* shall be assessed on the undivided interest at the proportion of the assessed value of the property that his undivided interest bears to the whole.” (Emphasis supplied.)

Thus, tenants in common, joint tenants, or tenants by the entirety are each “assessed on the undivided interest” they hold. From the framework of this Section it is again apparent that the word “assessed”

stands for the word “taxed”, otherwise Section (d) would have no meaning.

Section 14 continues the weaving of this consistent pattern by requiring the assessor of each division to prepare an “* * * annual assessment roll * * * covering property outside of municipalities and school districts and public utility districts, * * *” and to include thereon: “* * * the arrears of taxes *owing by any persons* * * *”. (Emphasis added.)

The word “taxpayer” is used throughout the Act. This descriptive noun has been generally defined as “a person chargeable with a tax; one from whom government demands a pecuniary contribution towards its support.” *Black’s Law Dictionary*, Third Edition, 1706; *Webster’s New International Dictionary*, Second Edition, Unabridged, 2587, Volume 41, *Words and Phrases*, page 221.

Section 25 authorizes any person to appeal to the Board of Assessment and Equalization with respect to any alleged overcharge. An “overcharge” means to charge a tax in excess of that permitted by law. See *Texas Power and Light Company v. Kousal, et al.*, 170 SW 2d 278, 284. It is difficult to conceive how *property* could be “overcharged”, the act of overcharging necessarily being made against a person.

Moreover, it must be recognized that the Alaska Property Tax Act includes a tax on *personal* property, which is easily removed or dissipated. And, although a lien may exist on the personal property, if the District Court decree is to be regarded as correct and the collection of taxes is limited to the remedies pro-

vided for in the Act (which only permits foreclosure of liens on *real* property), then there is no legal recourse to collect taxes on personal property. This point is further discussed hereafter. Because of the many transients in the Territory, the Legislature was readily justified in imposing a personal liability on the taxpayer. Admittedly, it could have accomplished its objective in more definite terms. However, the language is not so defective as to forego reaching the conclusion that the individual is also liable for the tax.

It is perfectly logical and not uncommon for a legislature to look to both the person and his property as a means of satisfying the taxes. And, unless the literal language of the above-quoted sections is to be completely disregarded, there is no alternative but to so conclude. To hold otherwise would be to place a limitation on the Act not authorized, a limitation which would seriously affect the amount of taxes recoverable by the Territory.

Personal Tax Liability Under Judicial Decisions.

Even under statutes imposing the tax solely *on the property*, the owner thereof has been held personally liable. A summary of the law as presently exists is concisely expressed in 84 C.J.S., 1318 Taxation, Section 643, wherein the syllabus reads:

“Under many taxing systems there is no personal liability on the part of an owner for taxes imposed *on his property*, but such personal liability may exist under statutory or constitutional provisions therefor, or by reason of judicial decisions.”
(Emphasis added.)

Without an extensive study, the following "judicial decisions" have been found wherein it has been held, without the apparent benefit of any supporting statute, that taxes *on real property* are a personal liability chargeable to the owner:

- Wiggins Estate Co., Inc., et al. v. Jeffery, et al.*,
(Ala.) 19 So. 2d 769;
- Bains Bros. Inv. Co. v. Purdie*, (Ala.) 60 So.
920;
- Gable v. Seiben*, (Ind.), 36 N.E. 844;
- Starling v. West Erie Avenue Building & Loan
Ass'n.* (Pa.), 3 A. 2d 387;
- Northumberland County, et al., v. Philadelphia
and Reading C. & I. Co.*, (Pa.), 131 F2d 562;
- Powers et al. v. City of Richmond*, (Va.), 94
SE 803, 806;
- Bibb Nat. Bk. v. Colson, et al.*, (Ga.), 134 SE
85;
- State v. Bennett, et al.*, (Tenn.), 180 SW 2d
891, 893;
- State ex rel. Bonner, et al. v. Andrews*, (Tenn.),
175 SW 563, 569.

And compare:

- Raymond v. King County*, (Wash.), 201 P. 455;
- Welberg v. Yakima County, et al.*, (Wash.),
231 P. 931, 933;
- Trustees of Phillips Exeter Academy v. Exeter*,
(N.H.), 33 A. 2d 665;
- Town of Cheraw v. Turnage*, (S.C.), 191 SE
831, 836;
- Rothrock v. Oakman*, (S.C.), 10 SE 2d 345, 348.

Taxes are the life-blood of the sovereign; without them government could not exist. For this reason, it is the policy of the law, as exemplified above, to lend all possible assistance in the collection of all taxes. See *Nassau County v. Lincer*, 254 App. Div. 746, 4 NYS 2d 77, 78.

2. Where a taxpayer is personally liable to pay a tax an action for the recovery thereof will lie.

Admittedly, the Alaska Property Tax Act does not provide for (1) a specific remedy for the collection of taxes against the person, or (2) a designated foreclosure proceeding of liens against personal property. Section 42 of the Act limits the recovery of unpaid liens “* * * in substantially the manner prescribed in Sections 22-2-8 to 22-2-18, both inclusive of the Alaska Compiled Laws Annotated, 1949, for the foreclosure of *land* registration liens, * * *”. (Emphasis added.) The Sections just referred to were originally taken from Chapter 49, Session Laws of Alaska, 1945, an Act designed, “To require declaration of the ownership of *land*, * * *” (Emphasis added.) Section 22-2-8 (Section 9 of Chapter 49, Session Laws of Alaska, 1945) is reprinted in the Appendix (pp. 31-32). Thus, under the Court’s opinion that the remedies in the Act are exclusive, the right to collect taxes are limited to foreclosing those liens on *real property*, and no other. And, if the lower Court’s opinion is found to be correct, this is the sole and exclusive remedy that has ever existed during the years the Alaska Property Tax Act was in effect. To carry the Court’s rationale to its ultimate end, individuals refusing to pay taxes

on *personal* property would at no time have ever been subject to legal action of any nature since neither a foreclosure proceeding against their personal property, nor an in personam action is expressly provided for in the Act.

It has been held by the highest Court of the land that if a remedy is inadequate to compel full performance of the tax obligation, such fact is persuasive in itself to conclude that it was not intended to be exclusive of applicable common law remedies by which recovery might be secured. See *Price, Receiver v. United States*, 269 U.S. 492; *United States v. Chamberlin*, 219 U.S. 250; *Dollar Savings Bank v. United States*, 86 U.S. 80, 19 Wall. 227. As the common law is applicable to Alaska, Section 2-1-2 ACLA 1949, (supra, page 11) the remedies allowed thereunder including the common law actions of debt and assumpsit, may also be resorted to.

In *Milwaukee County v. M. E. White Co.* (1935), 296 U.S. 268, 271, 80 L. ed 220, 224, the Supreme Court in discussing the nature of a tax obligation, had this to say:

“It is a statutory liability quasi-contractual in nature, enforceable, if there is no exclusive statutory remedy, in the civil courts by the common law action of debt or indebitatus assumpsit. * * *”

The Supreme Court of Tennessee, in *State v. Bennett, et al.*, 180 SW 2d 891, 893, left no doubt as to what legal action could be instituted by their state government:

“It has long been the rule in this state that ‘taxes, when assessed, become a personal debt, and that the government is entitled to all the remedies for their collection, including an ordinary suit at law, if it chooses to resort to that remedy.’ ” (Citing cases.)

The late Professor Cooley in his treatise on the Law of Taxation (Volume 3, Fourth Edition, p. 2629, Section 1330) summarized what is still the guiding rule today, in these words:

“In some states it has been held that an action at law may be maintained to collect taxes although a statute provides a special remedy for their collection, unless the statutory remedy is in terms made exclusive. However, in most jurisdictions it is held that statutory remedies for the collection of delinquent taxes are exclusive and preclude the maintenance of an action at law, i.e., that when the statute undertakes to provide remedies, and those given do not embrace an action at law, a common-law action for the recovery of the tax as a debt will not lie. Furthermore, some decisions hold that even where the statute which prescribes a special remedy for collection, other than a personal action, is inadequate or ineffectual, the statutory remedy is exclusive, *but the general rule is that if the statutory remedy is inadequate or ineffectual a personal action to recover the tax will lie.* An action to recover taxes is not precluded by statutory remedies which clearly are not exclusive, * * * ” (Numerous cases cited in the footnotes thereof.) (Emphasis added.)

The very fact that the remedy is manifestly inadequate to compel full performance of the tax obliga-

tion declared under the Act, is persuasive that it was not intended to be exclusive of applicable common law remedies. To hold otherwise leads to the doubtful and paradoxical conclusion that the Legislature did not intend that taxes on personal property were to be enforced and collected—notwithstanding the existence of a lien on such property.

Summary remedies have been authorized by every country in every age for the collection by the government of its revenues. *Webber Lumber Co. v. Shaw, et al.*, (Mass.) 75 NE 640.

It is contrary to the theory on which taxes are levied and collected that any one remedy should be treated as exclusive. The remedy which the Act provides for the collection of the tax is cumulative. The Territory should not be bound to select and pursue a single one. It cannot be presumed that the Legislature intended any such result.

In final analysis, the general rule appears to be that if the taxpayer is personally liable to pay the tax, and the statutory remedy provided for the collection of any delinquent taxes is not sufficient or exclusive, the government may bring an in personam action for the recovery thereof.

3. **The case of *City of Yakutat v. Libby, McNeill & Libby*, cited by the District Court as controlling precedent does not support the Court's conclusion.**

In the lower Court's written opinion, it disposed of the issue of collecting taxes against the person with this single paragraph:

“The Territory, in its brief, again raises this question of procedure, claiming a personal liability of the defendants for such taxes. This issue has been squarely determined against the plaintiff by the District Court for this Division in the case of *City of Yakutat v. Libby, McNeill & Libby*, 13 Alaska 378, 98 F. Supp. 101. Such action involved the question of remedy as to taxes levied by municipalities in which the Court held that the remedy sought of a personal action against the taxpayer is not available since the remedy prescribed by statute is exclusive. In the same manner Chapter 10 provided an exclusive method of levy and collection of the general property tax. This question, therefore, will not be further considered.” (R. 58.)

No part of the record of *City of Yakutat v. Libby, McNeill & Libby*, supra, was before the Court at the time of the argument of the Motion and, to appellant's knowledge, neither the Judge nor either party were in any way notified of the contents of the record in that case.

The written opinion filed in the *City of Yakutat* case in 13 Alaska 378 and 98 F. Supp. 101, does not support the above quoted conclusion and, in fact, conversely, imputes agreement with appellant's contentions herein.

The pronounced point of variance between *City of Yakutat* and the case at Bar is the different statutes involved. In *City of Yakutat*, the District Court was interpreting an Act of Congress together with two Territorial enactments—none of which are involved

herein—while in this action, the suit revolves around the proper construction of the Alaska Property Tax Act. The personal action brought against each of the appellees is derived from alleged rights claimed by the Territory under the Alaska Property Tax Act; therefore, the personal liability of each appellee should be decided by a careful reading and application of that Act.

A mere cursory examination of the language in 31 Stat. 321, 521, Section 201 (Appendix “F”, page 35) along with Sections 16-1-35 (9) (Appendix “E”, page 34) and 16-1-121 Alaska Compiled Laws Annotated (Appendix “B”, page 30 the relevant legislation which guided the Court to its conclusion in *City of Yakutat* will reveal that there is not the slightest inference or suggestion that a tax could be levied or assessed against the person. In contrast, particularly compare Sections 9, 12, 13, 14, 25 and the other Sections of the Alaska Property Tax Act referred to above, (*supra*, pages 9-13, 18.)

The character and language of the two taxing measures are so apart and unrelated that it is difficult to accept *City of Yakutat* as precedent herein.

Of utmost significance in the latter case is this statement:

“Whether the remedy sought by plaintiff existed by necessary implication before the passage of the act of March 2, 1903, *supra*, becomes therefore the crucial question. *The rule that in the absence of statutory provision, a personal action lies for the enforcement of the collection of a tax appears*

to be limited to taxes assessed against individuals, 1 Cooley on Taxation, 3rd Ed., 17.” (Emphasis supplied.) 13 A. 378, 381, 98 F. Supp. 1011, 1013.

Thus, the clear inference is, had Judge Folta found that a personal liability existed, he would have ruled a remedy was available for the collection of the unpaid taxes. The District Court erred as a matter of law in dismissing the Complaints because:

II.

- A. SECTION 2 OF CHAPTER 22, SESSION LAWS OF ALASKA 1953, THE ALLEGED SPECIAL SAVINGS CLAUSE, HAS A REASONABLE PURPOSE WHICH IN NO WAY INFRINGES UPON THE TERRITORY'S GENERAL SAVINGS CLAUSE, SECTION 19-1-1 ACLA 1949, AS AMENDED, AND THEREFORE, BOTH STATUTES SHOULD HAVE BEEN READ IN PARI MATERIA.
- B. ONCE IT WAS DETERMINED AND ESTABLISHED THAT AN AMBIGUITY EXISTS IN THE STATUTE (CHAPTER 22, SLA 1953), THE COURT WAS UNDER A DUTY TO MAKE USE OF ALL AVAILABLE INTERPRETATIONAL AIDS TO DETERMINE THE TRUE MEANING AND INTENT OF THE STATUTE.

Introduction.

The District Court, on its own initiative, decided that, in addition to dismissing the Complaints for failing to state a cause of action upon which relief could be granted, there allegedly being no basis for an in personam action, it was also incumbent upon the Court to “examine the question and try and determine the whole matter on the merits of the controversy rather than the question of remedy.” (R. 51.) This unsuspected announcement came without warning. Only a few minutes earlier, when appellant had sought to assist the Court in bringing about a correct inter-

pretation of Chapter 22, Session Laws of Alaska, 1953, by introducing House Bill No. 3, the original bill which had eventually materialized into that Act, the Court was emphatic in stating that in a Motion to Dismiss, evidence could not be introduced of something "other than the acts of the Legislature or such matters as Journal entries, of which the Court could take judicial notice, indicating any such intent or indicating the question of intent. We can hear only tests and sufficiency of the complaint, for which reason the offer to introduce this exhibit of the House Bill, which was not passed, as I understand it, by the Legislature, must be denied." (R. 48.)

Thus, for one portion of the proceedings the Court curbed the scope of consideration on the Motion to Dismiss and would not hear only matters testing the "sufficiency of the complaint"; yet, thereafter, and within the hour, it occurred to the Court to broaden the hearing and "examine the question and try and determine the whole matter on the merits of the controversy". (R. 51.) And "the merits of the controversy" were subsequently resolved, to the satisfaction of the Court, by its holding that Section 2 (a) of Chapter 22 excused, nullified and discharged all unpaid taxes due and owing the Territory under Chapter 10, Session Laws of Alaska 1949, the Alaska Property Tax Act. The appellant disputes the Court's conclusion and in support thereof, appellant submits the following arguments:

(A) Section 2 of Chapter 22, Session Laws of Alaska 1953, the alleged special savings clause, has a

reasonable purpose which in no way infringes upon the Territory's General Savings Clause, Section 19-1-1 ACLA 1949, as amended, and therefore, both statutes should have been read in *pari materia*.

(1) Even if it be assumed that Section 2 of Chapter 22, SLA 1953 were a special savings clause, it could not nullify the continuing rights and liabilities saved under a general savings clause if such was not the intention of the Legislature.

(B) Once it was determined and established that an ambiguity exists in the statute (Chapter 22, SLA 1953), the Court was under a duty to make use of all available interpretational aids to determine the true meaning and intent of the statute.

(1) Because of the particular circumstances existing in Alaska, the Court should consider any and all extrinsic aids which will help ascertain and establish the true legislative intent in passing Chapter 22, SLA 1953, and not limit itself to only those matters of which it can take judicial notice.

(2) Because of its direct bearing on one of the principal issues at Bar, the Court should have considered the bill originally introduced and the amendments thereto, which preceded the final adoption of Chapter 22, SLA 1953.

A. SECTION 2 OF CHAPTER 22, SLA 1953, THE ALLEGED SPECIAL SAVINGS CLAUSE, HAS A REASONABLE PURPOSE WHICH IN NO WAY INFRINGES UPON THE TERRITORIAL GENERAL SAVINGS CLAUSE, SECTION 19-1-1 ACLA 1949, AS AMENDED, AND THEREFORE BOTH STATUTES SHOULD BE READ IN PARI MATERIA.

In determining "the merits of the controversy", the District Court reached the conclusion that Section 2 (a) of Chapter 22, SLA 1953 was, in fact, a "special savings clause" within the repealing Act and, as such, was an exception to the Territorial General Savings Act which preserves all rights accruing or accrued prior to the repeal of any Act. As a result, the Court was of the view that only those taxes owed to municipalities, school or public utility districts could be collected, and conversely, unpaid taxes owed to the Territory, appellant herein, were excused and nullified.

Section 19-1-1 ACLA 1949, as amended, is quoted in full in the Appendix (see page 55). The relevant portions are as follows:

"The repeal or amendment of any statute shall not affect any * * * right accruing or accrued * * * nor shall any * * * liability incurred under such statute be released or extinguished, but the same may be enforced, continued, sustained, prosecuted and punished under the repealing or amendatory statute save as limited by the ex post facto and other provisions of the Constitution, in which event the same may be enforced, continued, sustained, prosecuted and punished under the former law as if such repeal or amendment had not been made. * * *"

Section 2 of Chapter 22, SLA 1953, the alleged "special savings clause" directed that Section 1 of the Act shall not be applicable to:

"(a) any taxes which have been levied and assessed by any municipality, school or public utility district under the provisions of Chapter 10, Session Laws of Alaska 1949, as amended, or which are levied and assessed during the current fiscal year of such municipality, school or public utility districts; * * *."

The Doctrine of Pari Materia.

It is a fundamental rule of statutory construction that statutes are not to be considered as isolated fragments of law. They should be construed together, as a whole, or as parts of a great connected, homogeneous system of a single and complete statutory arrangement. See 50 Am. Jur. 345, *Statutes*, Section 349. Implied repeals or limitations of one act by another are never favored. And it is not for the Courts, unless the conflict between the two acts is inescapable and conflicting, to exclude from the coverage of an act matters which its terms expressly include, on the theory that a later act has a purpose which seems inconsistent and has thus impliedly repealed or limited the act under view. Only where it is found not possible for both acts to co-exist can an act be held to repeal or limit another, and then only in respect to the precise point of conflict. *United States v. 24 Cans Containing Butter, et al.*, 148 F2d 365, certiorari denied, 90 L. ed 450, 326 US 752; re-hearing denied, 90 L. ed 493, 326 US 808. Where

there are any reasonable grounds for continuing the effectiveness of both statutes, a repeal will not be presumed. *United States v. Kushner*, 135 F2d 668, certiorari denied, 87 L. ed 1850, 320 US 212. *Grimes Packing Co. v. Hynes*, 67 F. Supp. 43, 11 Alaska 154. Different acts should be harmonized unless a different purpose is shown plainly or with irresistible clearness. *State v. Shattuck*, 38 Atl. 81.

Accordingly, if a reasonable purpose may be attributed to Section 2 (a) of Chapter 22, which does not traverse or destroy Section 19-1-1, the Territory's General Savings Clause, then both statutes should be read in *pari materia*. Particularly compare *Great Northern Ry. Co. v. United States*, 155 Fed. 945, 962, affirmed 208 US 452.

Legislative Background Considerations.

Section 2 should be viewed in the full texture of the law and economy to which it applies. Ofttimes language draws to itself or includes persuppositions not always commensurate with what the authors intended. Words may carry a meaning to insiders which is not within the sure discernment of those viewing the law from a distance. It is the *reason* of the law that should prevail. *Acheson v. Fujiko Furusho*, (9 CCA, 1954) 212 F2d 284, 295.

The intent of the Legislature should be viewed from what considerations motivated the legislators at the particular time and place, and in the setting in which they repealed the statute. This Court recognized, in *Hess v. Mullaney*, (*supra*) that members of the Legis-

lature necessarily enjoy a familiarity with local conditions which Courts do not have. See Footnote 7, 213 F2d 635, 643, 15 Alaska 40, 56.

The favorable consideration and attention given by the legislators to incorporated cities and independent school and public utility districts (from which legislators are elected) cannot be minimized or overlooked. Even under the initial provisions of the Alaska Property Tax Act (Chaper 10, Session Laws of Alaska, 1949, Appendix "A", page 1) special care was made to assure that revenues collected thereunder would be directly channeled to the various cities and school districts. Under Section 4 of the Act taxes within the school districts, cities or public utility districts, were to be "assessed, collected and enforced in the manner prescribed by the property tax law of the municipality or district" and immediately turned over to the "city treasurer," "the district school board" or, impliedly, the public utility district treasurer.

The financial precariousness of municipalities, school and public utility districts preceding the convening of the 1953 Territorial Legislature was a matter of common knowledge to all persons in Alaska at that time.⁵ The welfare of these small governing

⁵In Governor Ernest Gruening's message to the 1953 Territorial Legislature, reprinted in both the House and Senate Journals for that session, the former Governor warned:

"* * * very nearly all incorporated towns have issued bonds which in some cases threaten to exhaust their statutory debt limitations. Such indebtedness has an adverse effect on them in two ways: first, it prevents them for some years in the immediate future from helping themselves to meet fiscal emergencies that may, and too often do, arise. Second, it places

bodies being of deep and paramount concern to the 1953 legislators, they were rightfully disposed to take every precaution that no claim or right possessed by these political subdivisions would in any way be jeopardized, questioned or imperiled.

It was in this general atmosphere that Section 2 (a) of Chapter 22 was drafted.

The Legislature's Purpose in Enacting Section 2 (a).

The Territorial Legislature manifested its protective attitude towards Alaska's small communities when it enacted Section 2 (a) of Chapter 22 and affirmatively assured them of the right to collect all taxes levied and assessed up to and including the year 1952, *together with the recovery of any taxes levied and assessed "during the current fiscal year."* (Emphasis added.) It is vital to appellant's argument that this Court take cognizance of the important *additional right* in the form of a pecuniary advantage that was being allowed municipalities, schools and public utilities under Section 2 (a) but denied to the Territorial Government.⁶ Cities and districts were authorized to

them in the position of neglecting other needed and important public works in order to meet minimum educational demands. * * *'' See Senate Journal, 1953, page 59.

⁶In the opinion filed by the lower Court, the District Judge answered appellant's explanation of Section 2 (a) in this fashion:

"Plaintiff also argues that Section 2 of the repealing act was not intended to be a savings clause, but was intended to 'afford' or 'allow' municipalities, school and public utility districts additional revenues by allowing them to still levy and assess taxes previously accrued and to accrue during the fiscal year. This logic may be likened to arguing that a revenue act does not create a revenue tax but is levied only for the purpose of collecting revenue; and is wholly unsound.

* * *'' (R. 64.)

continue to levy, assess and tax property “during the current *fiscal period*” (Emphasis added) or into the midyear of 1953, the ordinary fiscal year extending from June 1 until May 31; whereas, the appellant was completely prohibited from levying and assessing any taxes after the year 1952.

In other words, insofar as municipalities, school and public utility districts are concerned, the Alaska Property Tax Act was to continue in full force and effect up to the end of the “current fiscal year” of each designated city and district; while, on the other hand and insofar as the Territorial Government was concerned, the Alaska Property Tax Act was repealed as of December 31, 1952.

Perhaps the most definitive illustration of this point is to pose it in the form of a question:

Had it not been for Section 2 (a), would the municipality, school and public utility districts have had the right to *continue* to levy and assess taxes under Chapter 10, Session Laws of Alaska 1949 “during the current fiscal year” of 1953?

The answer is self-evident and supports appellant’s contention that Section 2 (a) has a purpose and design all its own, the giving of a *right* to municipalities and school and public utility districts to continue collecting taxes to a date beyond that allowed by the appellant.

One of the principal errors committed by the lower Court was its accentuating one part of Section 2 (a) and completely ignoring the remainder thereof. It is

unfair to merely interpret and construe that portion of Section 2 (a) which holds that the repealing section of Chapter 22 shall not be applicable to "any taxes which have been levied and assessed by any municipality, school or public utility district" and deny any effect, recognition or purpose to the all-important concluding language within the very same section and sentence which reads:

"* * * or which are levied and assessed during the current fiscal year of such municipality, school or public utility district; * * *".

Particularly is this so when one of the most prevailing rules of statutory construction makes it mandatory that Courts exercise every possible effort to reconcile statutes on the same subject so that they can stand together. The whole underlying objective of the doctrine of *pari materia* would be perpetually frustrated if courts could interpret statutes in a piece-meal fashion.

Ordinarily, a statutory paragraph, whether encompassed within a "section" or "subsection" is designed to accomplish a single and dominant objective. In reading Section 2 (a), it is significant that the Legislature saw fit to consolidate the right of the cities and districts to recover the taxes due and owing them from previous years, together with the right of these same cities and districts to levy and assess taxes for the current fiscal year. Admittedly, at first blush, it may appear that two different purposes expressed within the same paragraph; in fact, within the same sentence. However, if both phrases of the sentence are

viewed as coherent or integral parts of a whole, one complementing the other and both tending towards the same end, any imaginary difference becomes reconciled and both phrases are accomplishing one principal objective. A section should be read, construed, and considered as a whole. Therefore, if appellant's premise—which it earnestly believes to be so compelling as to be conclusive—is accepting, that the dominant objective of the Legislature was to allow only cities and districts and not the Territory to recover taxes “during the current fiscal year”, 1953, then the subservient or incidental right of these political subdivisions to recover past taxes was merely a superabundance of caution to assure that the inclusion of the additional benefit would in no way affect existing right to recover the delinquent taxes for the years 1949 through and including 1952. It is not unreasonable to deduce that had Section 2 (a) merely “saved” taxes for the “current fiscal year”, a taxpayer would have contended this was a “special savings clause” and, therefore, precluded the cities and districts from recovering any delinquent taxes for the preceding years when the Alaska Property Tax Act was in effect.

Appellant is confident that had the Court explored further into the legislative intent, it would also have found that this was the principal purpose of Section 2 (a).

To repeal or limit a general savings clause by a subsequent act requires an irreconcilable conflict. It must appear that the two statutes cannot stand together. Or, as the same thing is at time expressed, a statute

couched in clear and explicit terms is not overthrown by possible, but not necessary, implications flowing from after legislation. *Great Northern Ry. Co. v. United States*, (supra); *State of California v. United States*, 75 F2d 41, 42; *Boston Sand & Gravel Co. v. United States*, 278 US 41, 73 L. ed 170; *United States v. Fixico, et al.*, 115 F2d 389; *United States v. Borden Co.*, 308 US 188, 84, L. ed 181, 188; 1 *Sutherland's Statutory Construction*, 3d Ed., Section 2012. The necessary reciprocal repulsion that must exist for Section 2 (a) of Chapter 22, Session Laws of Alaska 1953 to limit or void the application of Section 19-1-1 ACLA 1949 is not here present. There can be attributed a distinct purpose for both enactments and their co-existence should have been reconciled.

- (1) Even if it be assumed that Section 2 of Chapter 22, SLA 1953 were a special savings clause, it could not nullify the continuing rights and liabilities saved under a general savings clause if such was not the intention of the Legislature.

Had the Legislature intended to cancel, repeal and abrogate all accrued and unpaid taxes levied and assessed under Chapter 10 it is inconceivable that it would have excused hundreds of thousands of dollars in unpaid taxes in the casual manner set forth in Section 2 (a). Surely a dedication of that great magnitude was deserving of a "section" or "subsection" all it own—rather than to be meshed together in a single sentence expressing a possible dual objective. As will be discussed more fully hereafter, the legislators were not unaware of language which would have clearly, accurately, precisely and unequivocally stricken the payment and collection of all unpaid taxes for

the years involved. The District Judge refused to admit in evidence a properly certified copy of the original House Bill No. 3, which eventually became Chapter 22. Section 2 of that Bill, rejected by both legislative bodies, read as follows:

“Section 2. That all accrued and unpaid taxes on real property and improvements, and personal property, boats and vessels, levied under the provisions of Chapter 10, Session Laws of Alaska, 1949, as amended by Chapter 88, Session Laws of Alaska, 1949, are hereby cancelled, repealed and abrogated, and declared null and void.”

Thus, that which the Legislature had laid to rest has had the breath of life restored to it by the lower Court.

Assuming, *arguendo*, that Section 2 (a) is a special savings clause, the same canons of construction discussed above apply. In *Commonwealth v. Budd Realty Corp.*, 28 At. 2d 132, 135, the Court stated:

“* * * while a specific savings clause, if any, many take precedence over a general savings clause, and while taxing statutes must be strictly construed, we feel that these considerations should not outweigh the intention of the Legislature which a broad view of the situation reveals.”

The case of *Great Northern Ry. Co. v. United States*, 155 Fed. 945, is a case particularly deserving of attention for the reason that it also involved the interpretation and application of a special savings clause *in a criminal proceeding*. In 1906 Congress passed the Hepburn Act, 34 Stat. 584, which amended

and reenacted the Elkins Act, 32 Stat. 847. The defendants were indicted the following year for having previously violated the defunct Elkins Act by giving freight rebates to a grain shipper. The subsequently enacted Hepburn Act contained a blanket repealer or "specific savings clause" reading:

"* * * but the amendments herein provided for shall not affect causes now pending in courts of the United States, but such causes shall be prosecuted to a conclusion in the manner heretofore provided by law."

The defendants argued that the special savings clause in the Hepburn Act saved the Government's right to only prosecute criminal actions which were pending when the later Act was passed and that Congress had shown an intent to preserve these liabilities alone, thus rendering the general savings statute inapplicable, an argument not unlike that advanced in the District Court by the appellees herein. The Circuit Court of Appeals for the Eighth Circuit refused to accept this argument, declaring:

"* * * In these circumstances we are persuaded that the special saving clause can be accorded reasonable purpose and operation by treating it as intended only to save such causes from what, in its absence and in the presence of the general saving clause, would be the effect of the amendments upon them and we accordingly hold that, rightly interpreted, it does not cover any part of the particular subject of the general saving clause, and, therefore, does not by necessary implication manifest an intention to release or extinguish penalties, forfeitures, and liabilities for the en-

forcement of which no clause was then pending.”
(pg. 964)

The argument that a specific savings clause controls the provisions of the Territorial General Savings Clause has been denounced by this Court within the past year.

In *Coughlan v. United States of America*, 225 F2d 677, 15 Alaska 659, the appellant therein (defendant) contended that the General Savings Clause was nullified by Section 16 of Chapter 196, Session Laws of Alaska 1955, an Act integrating the Bar of Alaska into a Territorial-wide Association. That Section reads as follows:

“Section 16. Repeal. The following provisions of law are expressly continued in force and effect to and including June 30, 1955, but thereafter they shall be deemed repealed in their entirety; * * *.”

The theory advanced was that while the judgment rendered against the appellant remained valid so long as the old Act was in force, it was obliterated by the appeal not being completed prior to June 30, 1955.

This Court declined to give such an “absurd construction of the above-quoted provision” (225 F2d 667, 679) and held that by virtue of the Territory’s General Savings Clause, Section 19-1-1 ACLA 1949, as amended, the defendant’s disbarment continued beyond June 20, 1955, notwithstanding the alleged “special savings clause”. And see *Stringer v. United States*, 225 F2d 676, 15 Alaska 656, wherein the same

General Savings Clause was held to authorize the valid and continuing appeal in this Court of a disbarment order notwithstanding the defendant's contention that "the new act is an entire substitute" for the Act under which defendant was disbarred.

There is an old well-known rule that statutes which in general terms divest pre-existing rights or privileges will not be applied to the sovereign without express words to that effect. Compare *United States v. Wittek*, 93 L. ed 1406, 337 US 346.

In *Dollar Saving Bank v. United States*, 19 Wall. (U.S.) 227, 239, 22 L. ed. 80, 82, the Court stated:

"* * * The most general words that can be devised (for example, any person or persons, bodies politic or corporate) affect not him (the King of England) in the least, if they may tend to restrain or diminish any of his rights and interests. * * * The rule thus settled respecting the British Crown is equally applicable to this Government, and it has been applied frequently in the different States, and practically in the Federal Courts. It may be considered as settled that so much of the royal prerogative as belonged to the King in his capacity of *parens patriae*, or universal trustee, enters as much into our political state as it does into the principles of the British Constitution. * * *"

B. ONCE IT WAS DETERMINED AND ESTABLISHED THAT AN AMBIGUITY EXISTS IN THE STATUTE (CHAPTER 22, SLA 1953) THE COURT WAS UNDER A DUTY TO MAKE USE OF ALL AVAILABLE INTERPRETATIONAL AIDS TO DETERMINE THE TRUE MEANING AND INTENT OF THE STATUTE.

Although the lower Court refers to the "obvious intent" and "clear language" of the Legislature, the Court conceded the existence of an ambiguity in the wording of Chapter 22, Session Laws of Alaska, 1953. See Court's Opinion, R. 65. The Court, among other things, stated:

"* * * the Court may take judicial notice of the history of the passage of this particular act to determine the meaning of terms and expressions if they are in any way ambiguous. * * *"

Following the assertion, above quoted, the Court proceeded to examine the "history" of the passage of House Bill No. 3, which eventually became Chapter 22, by examining the House Journal of which it could take "judicial notice".⁷ It is appellant's position that once having determined and established that an ambiguity existed, the Court was then under a duty to make use of all available interpretational aids to ascertain the true meaning and intent of the statute. Mere reference to the Territorial House Journal would not disclose the *full* history of the Act because of the very limited data contained therein. To seek out the mean-

⁷In retrospect, it is believed the Court mistakenly applied the "enrolled bill rule"—which provides that a Court cannot look beyond the journals, and the bill as enrolled and filed with the Secretary of State to determine the validity of the *passage* of the Act—to a legal situation demanding the inspection of all legitimate evidentiary aids possible to determine the true interpretation of an ambiguous statute.

ing of words in an ambiguous statute, they should be submitted to the test of *all* appropriate maxims of statutory construction together with any documentary and other proof which does not violate the rules of evidence.

- (1) **Because of the particular circumstances existing in Alaska, the Court should consider any and all extrinsic aids which will help ascertain and establish the true legislative intent in passing Chapter 22, Session Laws of Alaska 1953, and not limit itself to only those matters of which it can take judicial notice.**

When a Court or jury is seeking to ascertain the existence or non-existence of a fact that are not restricted to only matters of which the Court may take "judicial note". In Volume 2, Sutherland's Statutory Construction, 3d Edition, 320 321, Section 4505, the late Professor Sutherland whose treatise is still one of the recognized authorities in this area of law, admonished the Courts with these words of caution:

"The preceding criticisms of present techniques in interpretations do not mean that the interpretive process can or should be left exclusively to intuition. The dangers of usurping the legislative function in the guise of interpretation are all too apparent. The criticisms merely insist that the formalisms of the present rules founded upon nineteenth century fallacies concerning meaning and language may effectively cloak judicial usurpation of legislative power. The substance of the criticism is this: independent judicial determination arrived at exclusively from the reading of the words in the statute does not insure accurate interpretation and thus for the court to assert

that the statute is clear and unambiguous is merely to assert that the statute as read by the court produces a result which is satisfactory to the court. It does not necessarily mean that as read it reflects the legislative intent."

It is fitting to initially examine the effect of the self-limitation imposed by the lower Court when it refused to consider evidentiary matter beyond that of which it could take judicial notice. For all purposes such a ruling restricted the sources of enlightenment to the Territorial House Journal.

Neither the Alaska Senate nor House Journals, maintained by the Legislature, can in any way be likened to the Congressional Record. This latter government printed publication contains a verbatim and chronological entry of almost every proceeding in both Houses of the United States Congress, together with reports, comments, and other expressions of view declared openly or in writing by law-makers or committee members on the various bills being considered. Even recommendations and messages from persons in the judicial and executive branches of the Government are often included therein. Therefore, when a Court takes judicial notice of the Congressional Record, it is looking to a wealth of significant and pertinent data which promises to lend material aid in finding the true intent of the Congress in passing a particular statute.

Contrasted with the Congressional Record, the Alaska House and Senate Journals are almost void of

helpful information. This Court's attention is called to the history of House Bill No. 3 as it appears in the House Journal. (See Appendix "G", pages 36-54.) No reason, apparent or otherwise, appears at any time for any course of action taken by either House of the Legislature. Recommendations by different committees are made without any discernible basis. No debates or arguments are recorded. The testimony of witnesses is unknown. The Journals simply record the title of a bill and a brief summary of the legislative action taken thereafter. No section or provision of law is ordinarily printed therein, although there is an occasional exception. At no time is the original measure or bill printed therein.

It is no reflection upon legislative integrity, nor criticism of legislative methods to say that State and Territorial Journals are often hurriedly made up, written by clerks, oftentimes inexperienced and in some instances overburdened with work. As the session advances and the business accumulated, the saving of time becomes more important and the reading of the journal of preceding days is oftentimes dispensed with, so that mistakes fail of correction and unfortunately pass to forms of "legislative history".

It is also a notorious fact that in many cases, and to a great extent in all cases, the journals are not made up until after the legislative session has closed. They are then put into such methodical shape as can be made up of the loose and disconnected memoranda noted from day to day as the legislative session progresses. These facts justify courts in attaching less

weight to journals of legislative proceedings as would bear upon legislative intent and conversely, make it necessary to look to other acceptable evidence bearing on the purpose of the law. Compare *In re Taylor*, 55 Pac. 340; *Homrighausen v. Knocke*, 50 Pac. 879; *Duncan v. Combs*, 115 S.W. 229; *People ex rel. Attorney General v. Burch*, 47 N.W. 765; Volume 1, *Sutherland's Statutory Construction*, 3d Edition, page 237, Section 1410, Footnote 1. Before a matter may be judicially noticed it must be "known"—that is, well-established and authoritatively settled. See 4 *Wigmore on Evidence*, Section 2580; 20 Am. Jur. 50, *Evidence*, Section 19. Although the issue is not raised herein by appellant there is a serious question whether the Alaska Journals contain data of such a certainty as to preclude challenge.

From the above, it is evident that the lower Court has set a precedent which will shackle the judiciary in Alaska from hereafter considering any extrinsic evidence that will shed light on the *subjective* intent of a particular legislative body. It is wholly unreasonable and flies in the face of reality to say that the intent of the 1953 Territorial Legislature must be determined by looking solely to the House Journal, a publication giving little more than a thumbnail sketch of what transpired during the legislative session.

It thus becomes imperative that extrinsic—or any proper evidence—be available to ascertain the intent of a legislature which inevitably is primarily made up of laymen. By "proper evidence" appellant means that type proof which does not transcend the accepted

rules of evidence. After all, "judicial notice" does no more than relieve a party from having to submit formal proof of a *fact* which has been established to be a matter of common knowledge. *Mills v. Denver Tramway Corporation*, (10th CCA) 155 F2d 808. However, if an essential fact is not common knowledge, no good reason is suggested why it cannot still be established by other competent and admissible evidence.

When accurate means of ascertaining subjective intent are available they should be considered. This is not so much a rule of law as a simple principle of logic, in that it assures reliability rather than speculation.⁸ Canons of construction of writings are merely designed to aid in determining the intent of the writer by objective methods. Far more rewarding and directly bearing on the intent of a particular legislature would be such extrinsic aids as the following:

Written or printed reports of legislative standing and special committees. Compare *Church of Holy Trinity v. United States*, 143 US 457, 464; *Gooch v.*

⁸Within this very past month, this Court has indicated the importance it attaches to ascertaining what is, in fact, the true intent of the lawmakers when enacting a particular statute. In *Kaline v. United States*, No. 14,635, decided by this Court on June 11, 1956, this Court apparently on its own initiative, made an exhaustive search of the Congressional Record to "ascertain the intent of Congress" in passing a certain provision in the Universal Military Training and Service Act of 1951. This Court also examined "The Conference Report of the managers on the part of the House" which is found in U.S. Code Congressional and Administrative Service, 82d Congress, First Session, Volume 2, p. 1513. And the comments of a Senator made in the Senate were looked to for some indication of what was intended.

United States, 297 US 124; *Hood Rubber Co. v. Commissioner of Corporations and Taxation*, 167 N.E. 670, 70 A.L.R. 1. Written or printed statements made by the draftsmen of the proposed bill, as to their understanding of its nature and effect. *United States v. Whyel*, 28 F2d 30; and compare *United States v. Rehwald*, 44 F2d 663 (S.D. of California). Written or printed statements made by the executive branch of government while the legislators were considering related bills. See *Shelton Hotel Co. v. Bates*, 104 Pac. 2d 478. Written or printed opinions by the Attorney General made at a time when the bill was being considered. See *Red Canyon Sheep Co. v. Ickes*, 98 F2d 308; *Doyle v. Fox, et. al.*, No. 14,601 (CAA 9th), filed June 12, 1956. Written or printed statements of witnesses or interested parties urging amendments or changes in the proposed bill. *Securities & Exchange Commission v. Robert Collier & Co.*, 76 F2d 939 (CCA 2d 1935); *Penn Mutual Life Insurance v. Lederer*, 252 US 523, 534, 64 L. ed 698.

The drafting of bills requires an experienced hand. This Court is undoubtedly aware that few States or Territorial Legislators are equipped with the talent necessary to author a bill which will weather legal attack. Most legislation is copied or borrowed from the larger states who hire specialists to perform this difficult chore. Although the Attorney General is each jurisdiction ordinarily assists in this highly skilled field, his staff is generally limited and their time fully occupied with other duties of office. The lack of proficiency in the writing of laws has undoubtedly been

the cause of much litigation. In 1953, the same Legislature which drafted Chapter 22, passed an Act wherein they repealed a Territorial law (Section 65-9-34 ACLA 1949) in the title of the Act and yet omitted to do so in the body thereof. See Chapter 19, SLA 1953.⁹

If we accept Professor Sutherland's analysis that statutory construction is but a fact issue, and recognize that words are at best inexact tools of expression, then it should follow that all relevant aids, extrinsic or otherwise, should be sought in construing laws. *Harrison v. Northern Trust Co.*, 317 US 476, 87 L. ed 407; *United States v. American Trucking Associations, Inc., et al.*, 310 US 534, 84 L. ed 1345. Particularly is this so where the exigencies and circumstances demand this approach as a practical matter. In such instances all legitimate and reasonable means should be used to arrive at the legislative intent and the sources of enlightenment should not be limited. As early as 1804 Chief Justice John Marshall of the Supreme Court of the United States stated:

“* * * Where the intent is plain, nothing is left to construction. Where the mind labors to discover the design of the legislature, it seizes every thing from which aid can be derived; * * *.”

United States v. Fisher et al., 2 Cranch (U.S.) 358, 386, 2 L. ed 304, 313.

⁹This Legislature also passed an Act creating a Legislative Council, Chapter 69, SLA 1953, which has, among other duties, that of preparing a “legislative program in the form of bills or otherwise”.

- (2) Because of the ambiguity of the statute and the direct bearing on the legislative intent, the Court should have considered the bill originally introduced and the amendments thereto, which preceded the final adoption of Chapter 22, SLA 1953.

As stated above, the Court refused to admit into evidence and examine the wording originally employed by the author of House Bill No. 3, which was the genesis of Chapter 22. Section 2 of that Bill, when initially introduced, read as follows:

“Section 2. That all accrued and unpaid taxes on real property and improvements, and personal property, boats and vessels, levied under the provisions of Chapter 10, Session Laws of Alaska, 1949, as amended by Chapter 88, Session Laws of Alaska, 1949, are hereby cancelled, repealed and abrogated, and declared null and void.”

As the legislative history reveals, House Bill No. 3 was introduced on January 27, 1953. (See Appendix “G”, page 36). Within two days thereafter the Committee on Judiciary and Federal Relations reported this Bill back to the House with the recommendation that it “do pass” with the following amendments:

“The title be changed to read:

‘An Act to repeal the Alaska Property Tax Act enacted by Chapter 10, Session Laws of Alaska, 1949, as amended by Chapter 88, Session Laws of Alaska, 1949, and declaring an emergency.’

Section 2 of HOUSE BILL No. 3 be deleted.”
(Emphasis added.)

The Bill was then referred to the House Committee on Ways and Means. Within less than a week that

Committee recommended that the changes suggested by the Judiciary Committee, including the deletion of Section 2 quoted above, be adopted. On February 11, 1953, the Bill was passed by the House with the above changes. Thus, the issue of whether or not "all accrued and unpaid taxes" should be "cancelled, repealed and abrogated, and declared null and void" was squarely before the House and rejected in what must be interpreted as an intentional, deliberate and positive act of that body, clearly manifesting its refusal to excuse any unpaid property taxes due and owing prior to the year 1952.

When House Bill No. 3 reached the Alaska Senate on February 12 of that same year, it was referred to the Senate Committee on the Judiciary and Federal Relations. (Appendix "G", page 43). One week later that Committee returned the Bill with a recommendation that the following amendment be made:

"Insert new Section 2 as follows:

Section 2. Section 1 of this Act shall not be applicable to:

(a) any taxes which have been levied and assessed by any municipality, school or public utility district under the provisions of Chapter 10, Session Laws of Alaska, 1949, as amended, or which are levied and assessed during the current fiscal year of such municipality, school or public utility district; and

(b) any exemptions from the taxes referred to in sub-section (a) of this section, which have been granted under the provisions of Section 6 (h) of Chapter 10, Session Laws of Alaska 1949."

No written report or accompanying memorandum appears in the House or Senate Journal suggesting why this new section was introduced. Even if such document existed, it would not have appeared in the Legislative Journal, for such practice has not been adopted in Alaska as is self-evident by a mere cursory examination of either Journal.

House Bill No. 3 was thereafter referred to the Senate Committee on Taxation and Revenue and was subsequently returned without recommendation but "that the amendments offered by the Judiciary Committee be adopted". (Appendix "G", page 44). Two days later the title was amended to include "excepting from repeal certain taxes and tax exemptions". There being no objection, this amendment was also adopted. (Appendix "G", page 46). The Bill passed the Senate in this form and upon being returned to the House the amendment inserted by the Senate was adopted with no objection. Although the Bill was subsequently vetoed by the Governor (Appendix, pgs. 50-53), it passed when a two-thirds majority in each legislative House over-rode the veto. (Appendix, pgs. 53-54).

It is significant to notice at this time that Senate Bill No. 5, identical to House Bill No. 3 in its original form, was completely ignored and abandoned by the Senate, together with the language in Section 2 thereof which also sought to have cancelled, repealed and abrogated all "accrued and unpaid taxes".

In *Brooks v. United States*, 337 US 49, 51, 93 L. ed 1200, an automobile in which two servicemen were

riding was struck at a highway intersection by an army truck causing the death of one and personal injuries to the other, under circumstances which, in the case of persons not members of the Armed Forces of the United States would have given rise to a right of action against the sovereign under the Federal Tort Claims Act. It was contended by counsel for the United States that because the injured persons were servicemen they could not maintain an action under that Act. In refutation of this point, the attorney representing the injured surviving serviceman and the estate, called to the Court's attention, the bills originally introduced in Congress, which numbered eighteen, all of which had originally contained exceptions denying recovery to members of the Armed Forces but which in the final act removed such exceptions. The effect of deleting the intended exceptions from the final enactment was discussed by the Supreme Court in this language:

“More than the language and framework of the act support this view. There were eighteen tort claims bills introduced in Congress between 1925 and 1935. All but two contained exceptions denying recovery to members of the armed forces. When the present Tort Claims Act was first introduced, the exception concerning servicemen had been dropped. What remained from previous bills was an exclusion of all claims for which compensation was provided by the World War Veterans Act of [June 7] 1924—43 Stat 607, c 320, 38 USCA §421, 11 FCA title 38, §421, compensation for injury or death occurring in the first World War. HR 181, 79th Cong—1st Sess.

When HR 181 was incorporated into the Legislative Reorganization Act, the last vestige of the exclusion for members of the armed forces disappeared. See also Note 1, *Syracuse L Rev* 87, 93, 94.”

and see *Carey v. Donohue*, 240 US 430, 437, 260 L. ed. 726, 729; *Kelm v. Chicago St. P. M. & O. Ry. Co.*, 206 F 2d 831, 833; *Nicholas v. Denver & R. G. W. R. Co.*, 195 F 2d 428, 432; *Burnham Hotel Co. v. City of Cheyenne*, 222 Pac. 1, *Bender v. City of Fergus Falls*, 131 NW 849; *United Mutual Life Ins. Co. of Indianapolis, Indiana, v. State ex rel. Att. Gen.*, 108 SW 2d 484; *Crook et al. v. Commonwealth*, 136 SE 565, 567, 50 ALR 1043, 1047; *Ex parte Boehme*, 255 SW 2d 206.

In *Love v. Wilcox, et al.*, 28 SW 2d 515, 523, 70 ALR 1484, 1498, the Supreme Court of Texas stated:

“No court could justify putting into a statute by implication what both Houses of the Legislature had expressly rejected by decisive votes. * * * Once the legislative intent is ascertained, the duty of the court is plain. To refuse to enforce statutes in accordance with the true intent of the Legislature is an inexcusable breach of judicial duty, because an unwarranted interference with the exercise of lawful, legislative authority.”

The original of House Bill No. 3 was on file with the Secretary of Alaska and a proper certified copy thereof was secured by appellant from that public official. The authenticity was at no time questioned. However, the Court refused to consider this important evidentiary matter solely on the grounds that it was a document of which judicial notice could not be

taken. The changes made in House Bill No. 3 from its original language to its final passage is extremely pertinent and casts a revealing light on the legislative intent. Moreover, the Senate's implied refusal to adopt language which would have excused the unpaid taxes, as was expressed in Senate Bill No. 5, also was deserving of great weight and should not have been ignored.

House Bill No. 3 offered subjective evidence on the intent of the Legislature. The maxim *expressio unius est exclusio alterius* upon which the lower Court greatly relied, is a mere objective test and not deserving of the same consideration as evidentiary matter of a subjective nature.¹⁰

The Wilmington Trust Co. v. United States, and State v. Showers cases as controlling precedent for the legal conclusions arrived at by the District Court.

The Court below placed great reliance on two cases, *Wilmington Trust Co. v. United States*, 28 F2d 205, and *State v. Showers* (Kan.), 8 Pac. 474.¹¹

¹⁰The maxim *expressio unius est exclusio alterius* is a rule of construction and not of substantive law, and it can never override clear and contrary evidence of legislative intent. See *Neuberger v. Commissioner of Internal Revenue*, 311 U.S. 83, 85 L. ed. 58; *Springer et al. v. Government of the Philippine Islands*, 277 U.S. 189, 72 L. ed. 845; *United States v. Barnes*, 222 U.S. 513, 56 L. ed. 291. The rule is only an aid in ascertaining legislative intent and may not be employed to defeat such intent. *Mason v. United States*, 260 U.S. 545, 554, 67 L. ed. 396, 399. *State ex rel. Curtis v. De Corps, et al.*, 16 N.E. 2d 459; *Benson v. Chicago St. P., M. & O. Ry. Co.*, 77 N.W. 798; *United States v. Hardcastle*, 10 Alaska 254; *Anderson v. Smith*, 8 Alaska 470; *Freeman v. Smith*, 8 Alaska 229.

¹¹The *Showers* case was decided in 1885 and appears to be subject to the criticism made by this Court in *United Producers and Consumers Co-op. v. Held*, 225 F.2d 615, wherein the Court re-

The soundness of the reasoning in the *Wilmington Trust Co.* Case has been questioned in several instances and distinguished in others. See *New York Life Ins. Co. v. Bowers*, 34 F2d 60, 63; *Schoenheit et al. v. Lucas*, 44 F2d 476, 490; *Alker et al. v. United States*, 38 F2d 879, 883; *Hanna v. United States*, 68 Ct. Cl. 45, cert. den. 280 US 612, 74 L. ed. 654; and *Burrows et al. v. United States*, 56 F2d 465, 466. In the last cited case, the Court stated:

“* * * The Wilmington Trust decision was analyzed and discussed by this court in the Hanna Case when it declined to follow the rule in that case. The District Court of New Jersey in the Third Circuit has likewise refused to recognize the authority of the Wilmington Trust Case, and has followed the principles enunciated by this Court in the Hanna Case. *O’Brien et al. v. Sturges*, 39 F. 2d 950.”

The first vivid point of distinction readily apparent between the present case and *State v. Showers*, is that the latter involved a *criminal* conviction and the defendant had been “sentenced to pay a fine of \$150 and stand committed to the jail of Morris County until the fine and costs were paid”. The nature of the case and the continued commitment of the defendant in jail immediately suggests that a strict interpretation was called for under those circumstances.

The second distinctive feature is the obvious difference in language in the special savings clause consid-

ferred to several cases decided in 1901, 1911 and 1931 as being “stale authority from the late nineteenth and early twentieth century” and “outmoded”. (pgs. 617 and 630.)

ered by the Court in the *Showers* case and Section 2 (a) of Chapter 22, the germane provision in the case at Bar. The particular legislation before the Supreme Court of Kansas was considered to necessarily be a special savings clause because otherwise it would have "no office to perform". As has been discussed above, Section 2 (a) of Chapter 22, which was before the Alaska District Court does have an "office to perform", an important one, and therefore should not be labeled a "special savings clause".

CONCLUSION.

In its opinion, the District Court concluded that all taxes or unpaid taxes due and owing the Territory for the years preceding the repeal were to be excused "* * * however unjust such result may be as to those taxpayers who paid the property tax without protest." Should this conclusion prevail, the individuals who have intentionally violated and resisted complying with this particular Territorial revenue law stand to be endowed with favor; while the taxpayers who acted in a lawful, diligent manner and paid their taxes when due will be unfairly penalized. The existence of government would be short-lived if all citizens could escape their lawful burden of sharing in the cost of government by such inequitable tactics. An intentional act or omission to act which results in the violating of a tax statute obviously and directly tends in a marked degree to bring about a result which imposes on the interest and welfare of the public as a whole and is

therefore against public policy and not to be condoned. Moreover, it is the policy of the law to insure the collection of all taxes and whenever it is possible, on any theory to do so, the Courts construe the statutes to accomplish that result. *Nassau County v. Lincer*, (supra).

The Alaska Property Tax Act assessed and taxed the "person" or "taxpayer" and obviously contemplated that such tax is a personal obligation thereunder. This conclusion, evident by the wording of the statute, is further fortified when it is recognized that the tax is also on personal property which is easily removed or dissipated. When a personal obligation exists, the remedy to recover the taxes due and owing is implied, notwithstanding there being no express remedy in the Act.

When Section 2 (a) of Chapter 22 is read in the light of its context and setting, there is no sustainable basis for the contention that this Section was designed to be a "special savings clause". Furthermore, if at all possible, the lower Court should have made every effort to substantiate and reconcile both statutes. It would not have been difficult for the Court to have found a reasonable purpose for Section 2 (a) which does not infringe on the rights given the Territory under the general savings clause.

When a statute is found not to speak for itself and an uncertainty exists as to the expressions used therein, it is the duty of the Court to ascertain the will of the Legislature and avoid judicial legislation. In determining the intent, the Court should not re-

strict its search to sources embodied in the published act, such as the title of the act, nor to canons of construction which are mere objective tests. The District Court should have considered sources outside the printed page, particularly such extrinsic aids as House Bill No. 3 and Senate Bill No. 5 which bring out the subjective intent of the lawmaking body which passed the Act under consideration. Appellant is confident that if the lower Court had considered all statutory aids, it would have been as equally convinced as is appellant that it was not the intent of the Legislature to excuse the unpaid and accrued taxes due and owing the Territory.

One of the most apparent signs of legislative intent is the rejection by the Legislature of language which would otherwise have conferred certain rights or benefits such as the excusing of taxes due and owing. The necessary inescapable conclusion is that by rejecting such language, the Legislature did not intend to allow those rights or benefits. Under such circumstances, Courts should not thereafter judicially legislate and rewrite into law that which has been specifically excluded.

For the reasons stated in this brief, it is respectfully requested that the judgment of the District Court be reversed and modified so that the appellees are held to be personally liable for the unpaid taxes due and owing by them to the appellant for the years 1949 through and including 1952 and that Section 2 (a) of Chapter 22 be declared not a special savings clause or a provision of law in any way nullifying,

abrogating or destroying the right of the appellant to enforce and pursue all rights under Chapter 10, Session Laws of Alaska 1949, possessed and reserved to it by the Territory's General Savings Clause. (Section 19-1-1 ACLA 1949, as amended.)

Dated Juneau, Alaska,
June 22, 1956.

Respectfully submitted,

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(Appendices Follow.)

Appendices.

Appendix "A"

CHAPTER 10, SESSION LAWS OF ALASKA, 1949.

Section 1. TITLE. This Act may be cited as the "Alaska Property Tax Act".

Section 2. DEFINITIONS. As used in this Act, the following words and terms shall have the meanings ascribed to them in this section unless the context clearly indicates a different meaning:

(a) The word "assessor" means an authorized representative of a Board of Assessment and Equalization designated to perform the duties of making assessments in a judicial division.

(b) The word "board" means a Board of Assessment and Equalization.

(c) The word "Collector" means the Tax Commissioner or his authorized representative, employee or agent designated by him.

(d) The word "division" means judicial division as understood and recognized in Alaska.

(e) The word "improvements" includes all buildings, structures, fences and additions erected upon or affixed to the land, whether or not the title of the land has been acquired by any particular person.

(f) The word "include", when used in a definition contained in this Act, shall not be deemed to exclude other things otherwise within the meaning of the term defined.

(g) The word "person" means and includes any individual, trustee, receiver, firm, partnership, joint

venture, syndicate, association, corporation, trust, or any other group acting as a unit.

(h) The words "personalty" or "personal property" shall mean all machinery, equipment, household goods, and other tangible personal property which is located on or used in connection with particular land, or owned, possessed or used independently of any particular land.

(i) The word "property" means and includes real property, improvements, and personalty, as herein defined.

(j) The words "real property" or "land" mean any estate or interest therein, including permit or license rights, and improvements thereon, and shall include all timber or patented lands.

(k) The words "Tax Commissioner" means the Tax Commissioner of the Territory of Alaska.

(l) The words "tax lien" embrace liens for penalties, interest and costs as well as for unpaid taxes.

(m) The word "Territory" means the Territory of Alaska.

Section 3. LEVY OF TAX. For the calendar year of 1949, and each calendar year thereafter there is hereby levied, and there shall be assessed, collected and paid, a tax upon all real property and improvements and personal property in the Territory at the rate of one per centum of the true and full value thereof. For the purposes of this section the assessed value of unimproved, unpatented mining claims which are not producing, and nonproducing patented mining

claims upon which the improvements originally required for patent have become useless through deterioration, removal or otherwise, is hereby fixed at \$500.00 per each 20 acres or fraction of each such claim, except that if the surface ground of any such claim is used for other than mining purposes and has a separate and independent value for such other purposes, the valuation as pertains to such nonmining uses and of improvements incidental to such uses shall be according to the full and true value thereof.

Section 4. TAX UPON PROPERTY WITHIN INCORPORATED CITIES AND DISTRICTS. The tax levied under the provisions of Section 3 upon the property within the limits of an incorporated city or town, independent school district or incorporated school district in the Territory shall be assessed, collected and enforced in the manner prescribed by the property tax law of the municipality or district, by and at the expense of the municipalities and districts prorated proportionately between each, provided that amounts levied but which prove uncollectible, and the cost of foreclosure on delinquent accounts shall be borne by the city or school and public utility district.

All of the tax levied under this Act which is so collected shall be remitted to such municipalities or school districts as follows:

(a) As to cities which are not a part of an independent school district the municipal tax collection authority shall turn the amount of tax collected over to the city treasurer.

(b) As to incorporated school districts the tax collectors thereof shall turn the amount of tax collected over to the district school board.

(c) As to cities which are part of an independent school district the amount of taxes collected shall be turned over to the city treasurer. The city treasurer is hereby authorized and empowered to turn over to the school board such part of the funds collected as may be determined by the city council from time to time necessary to efficiently carry on school functions in said school district. Such cities may assess and collect an additional tax on real and personal property situate in the said cities not to exceed the amount allowed by law, which tax shall be assessed and collected at the same time and in the same manner as the tax provided in Section 3 of this Act, which said funds shall be used by said cities for general municipal purposes. Regarding that part of independent school districts outside of town bounds, the tax collection authority therein shall turn the taxes collected over to the district school board; provided that the millage levy for school purposes shall be uniform within incorporated school districts whether said district includes another incorporated municipality or not and any unused remainder up to the maximum levy hereunder shall revert to the Territorial Treasurer except that portion collected within any incorporated municipality within the boundary of such school district in which case such remainder, unused for school purposes, shall revert to the treasury of the incorporated municipality in which it may be collected.

(d) Taxes collected hereunder within a public utility district shall be handled in a like manner to those collected in cities or other incorporated municipalities, including collection costs, remissions and school millage levy provisions as set forth herein.

(e) In all cases where such local units are to receive such tax collections, the local tax collection authority shall, upon delivery of the money as above set forth, obtain a receipt in duplicate therefor and forward the duplicate thereof to the Tax Commissioner. The time or times to be set for payment on account of such collections shall be prescribed by the Tax Commissioner. Such other accounting as may be indicated shall be made to the Tax Commissioner at such times and in such manner as may be prescribed by him.

The tax money so collected which remains after remissions have been made shall be transmitted to the Tax Commissioner at such intervals and in such manner as he shall direct, for deposit with the Treasurer, to be covered into the general fund of the Territory.

Section 5. TAX ON PROPERTY OUTSIDE INCORPORATED CITIES AND SCHOOL DISTRICTS. The tax levied under the provisions of Section 3 upon property outside the limits of an incorporated city, independent school district, or incorporated school district or public utility district in the Territory shall be assessed, collected and enforced as provided in this Act.

Section 6. EXEMPTIONS.

(a) Property shall be exempt from taxation hereunder when used exclusively for educational, religious or charitable purposes.

(b) The property of the United States, of the Territory, and of any municipal corporation, independent school district, incorporated school district, public utility district and association operating utilities under arrangement with the Rural Electrification Administration, shall be exempt hereunder.

(c) The personal property of any person to the value of \$200.00 shall be exempt hereunder.

(d) The property of any organization not organized for business purposes, whose membership is composed entirely of the veterans of any wars of the United States, or the property of the auxiliary of any such organization, and all monies on deposit belonging to such organization shall be exempt hereunder, except any such property which produces rentals or profits for such organization.

(e) The laws exempting certain property from levy and sale on execution shall not apply to taxes levied hereunder or to the collection thereof.

(f) New industrial, commercial and business construction shall be exempt during the period of construction and until the plants or buildings are occupied or operated, but in no case shall this exemption exceed three taxable years from the time of beginning of construction. Modifications and repairs to existing structures shall not be considered new construction under this provision.

(g) All homesteads upon which entry has been made in accordance with the land laws of the United States shall be exempt from the date of entry until one year after the date upon which patent shall have been granted and final title acquired. Such exemption shall include all improvements upon such homesteads pertaining to residential or agricultural purposes.

(h) **INDUSTRIAL INCENTIVE CLAUSE:**
The Tax Commissioner is authorized to grant incentive exemptions hereunder in the manner and to the extent hereinafter set forth:

(1) An exemption of one-half of the tax otherwise imposed hereunder, or such other lesser fraction thereof as the Tax Commissioner may deem to be a necessary and proper encouragement to new industry as hereinafter defined, for such period not exceeding 10 taxable years from the date production is commenced, upon new plants and buildings and other installations, real estate and equipment, as are constructed and procured by new industrial enterprises, as hereinafter defined, to manufacture or process products which constitute industry new to Alaska with resultant establishment of new payrolls in Alaska.

The terms "new industry" or "new industrial enterprises" as used herein shall mean undertakings for the purpose of manufacturing or processing products not manufactured or processed in Alaska on the effective date hereof and for which plants have not already been established in Alaska.

(2) The Tax Commissioner shall establish and promulgate general standards and rules conformable to this Act for determining the eligibility of applicants for exemptions hereunder, and the extent to which exemptions for such applicants respectively are to be granted, including such factors as: permanence of the industry involved; the amount of its capital investment; whether it is a seasonal or continuous operation; whether it will likely be marginal because of distance from principal markets; transportation costs and differential in cost of production in Alaska as compared to cost of productions elsewhere; the number of resident Alaskan workmen who will be given employment; and other pertinent factors, related to improving the economy of the Territory of Alaska. He shall also consider in each case the recommendation of the Divisional Board of Assessment of the division in which the new industry is proposed to be established, which recommendation shall be obtained by the applicant in advance of the application and attached thereto. After all such factors are taken into consideration, the decision of the Tax Commissioner shall be rendered, subject, however, to final approval of the Divisional Board of Assessment. If after studying the Tax Commissioner's findings and decisions, the said Board, acting by majority of its members, is unable to agree with said decision, it shall, after reasonable notice to the Tax Commissioner and the affected new industry, hold a hearing and make the decision, which shall be final, except that when such exemption decision expires, the

position of the new industry may be re-evaluated and extension granted within the maximum limits allowed hereunder, in the same manner as provided for the granting of the original exemption.

(3) All exemptions granted hereunder shall be negotiated and consummated prior to the initial commencement of production by the applicant.

(4) Exemptions granted by the Tax Commissioner hereunder shall be applicable within or without municipalities, school districts or public utility districts.

Section 7. RETURNS.

(a) On or before the 15th day of July in the year 1949, and on or before the 15th day of March in each year thereafter, every person shall submit in duplicate to the assessor of the judicial division, a return of his property, and of the property held or controlled by him in a representative capacity, in the manner prescribed in this Act, which return shall be based on values existing as of January 1 in the same year.

(b) In every case the person making the return shall state an address to which all notices required to be given to him under this Act may be mailed or delivered.

(c) The return shall show the nature, quantity, amount and value of the property, the place where the property is situated, and said return shall be in such form as the Tax Commissioner may prescribe, and shall be signed and verified by the person liable, or his or its authorized agent or representative.

Section 8. **ADDITIONAL RETURNS.** The assessor may, by notice in writing to any person by whom a return has been made require from him a further return containing additional details and more explicit particulars, and upon receipt of the notice that person shall comply fully with its requirements within thirty days after its receipt by him.

Section 9. **POWER TO MAKE EXAMINATIONS.**

(a) An assessor shall not be bound to accept as correct the return made by any person, but if he thinks it necessary or expedient, or if he suspects that a person who has not made a return is liable to assessment, he shall make an independent investigation as to the property of that person, and may make his own valuation and assessment of the taxable amount thereof, which will be *prima facie* good and sufficient for all legal purposes.

(b) For the purpose of such examination, the assessor, personally or by any deputy designated by him, may enter upon any premises and may examine any property thereon, and shall have access to and may examine all property records involved, and such person shall, upon request, furnish to the assessor or deputy every facility and assistance for the purposes of such examination.

(c) An assessor may in any case examine a person on oath or otherwise, and upon request of the assessor, the person shall attend and submit himself to examination by the assessor.

Section 10. INSPECTION OF RETURN. No return made by any person under this Act shall be open for inspection by any person except officers authorized by law to administer this Act, or upon an official investigation or proceedings in court, and any Territorial employee who violates said restriction by communicating any information obtained under the provisions of this Act, except such information as is required by law to be shown on the assessment rolls, or allows any person not legally entitled thereto to inspect or have access to any return made under the provisions of this Act shall be guilty of a misdemeanor punishable under the penalty clause of this Act, and shall be discharged from his office or employment and be ineligible to hold any public office or employment for the Territory for a period of two years thereafter.

Section 11. VALUATION. Property shall be assessed at its full and true value in money, as of January 1 of the assessment year. In determining the full and true value of property in money, the person making the return, or the assessor, as the case may be, shall not adopt a lower or different standard of value because the same is to serve as a basis of taxation, nor shall he adopt as a criterion of value the price for which the property would sell at auction, or at a forced sale, either separately or in the aggregate with all of the property in the taxing district, but he shall value the property at such sum as he believes the same to be fairly worth in money at the time of assessment. The true value of property shall be

that value at which the property would generally be taken in payment of a just debt from a solvent debtor.

Section 12. **ASSESSMENT.** Every person shall be assessed and taxed annually on his property in the division in which the property is situated, and where any parcel of land is situated partly in one division and partly in another or partly within a municipality or school district and partly elsewhere, the assessment in respect of that parcel shall be made in the division or district within which the greater part of the property is situated. Real property and personalty shall be separately assessed.

Section 13. **TO WHOM ASSESSED.**

(a) Subject to subsection (b) and (c) of this section, property shall be assessed and taxed in the name of the owner or claimant or where the property is owned, occupied or claimed by two or more persons, it shall be assessed and taxed in the names of the owners, occupiers or claimants jointly.

(b) Where a verified statement is furnished showing that property has become the subject of a contract of sale or been leased by the owner to another person, the name of the other person shall be noted on the assessment roll and like notice of the assessment shall be sent to him as to the owner, in which case the taxes assessed in respect of the property may be received either from the owner or from the purchaser or tenant, or from any optionee, prospective distributee, purchaser or encumbrancer who desires to safeguard the title to the property.

(c) Land of the United States or the Territory which is held under any mining location, lease, license, agreement for sale, accepted application for purchase, or otherwise, shall be assessed and taxed in the name of the occupier according to the value of his interest therein (except as above modified in this Act with respect to certain mining claims); but no assessment or taxation in respect of land so held or occupied shall in any way affect the rights of the United States in the land.

(d) Where the property assessed is owned by two or more persons in undivided shares, each owner shall be assessed on the undivided interest at the proportion of the assessed value of the property that his undivided interest bears to the whole.

Section 14. CONTENT OF ASSESSMENT ROLL.

(a) The assessor of each division shall prepare an annual assessment roll for each division covering property outside of municipalities and school districts and public utility districts, after consideration of all returns made to him pursuant to this Act, and after careful inquiry from such sources as he may deem reliable. On the roll he shall enter the following particulars:

(1) the names and last known addresses of all persons with property liable to assessment and taxation;

(2) a description of all taxable property;

(3) the assessed value, quantity, or amount of said property and the taxes thereon;

(4) The arrears of taxes owing by any persons; and,

(5) any other information that may be required by the Tax Commissioner.

(b) It shall be a sufficient description of any property for the purposes of this Act, if there is entered on the assessment roll the best available short description of the property.

Section 15. ASSESSMENT NOTICE.

(a) The assessor, before completion of the assessment roll, shall give to every person named thereon a notice of assessment, showing the valuation and assessment of his property and the amount of taxes thereon, in such form as the Tax Commissioner may prescribe. At least 60 days must be allowed from date of such mailing within which to appeal to the Board against the assessment. He shall enter on the roll opposite the name of each person the date of giving the assessment notice which entry shall be prima facie evidence of the giving of the notice. On the back of each assessment notice shall be printed a brief summary for the information of the taxpayer, of the dates when the taxes are payable, delinquent, and subject to interest, dates when the Board will sit for equalization purposes, and any other particular specified by the Tax Commissioner.

(b) The assessment notice shall be directed to the person to whom it is to be given, and shall be sufficiently given if it is mailed by first class mail addressed to, or is delivered at, his address as last

known to the assessor; or, if the address is not known to the assessor, the notice may be mailed addressed to the person at the postoffice nearest to the place where the property is situated. The date on which the notice is so mailed or is so delivered for all purposes of this Act shall be deemed to be the date on which the notice is given.

Section 16. COMPLETION OF ASSESSMENT ROLL. The assessor shall complete the annual assessment roll for the year 1949 on or before the 1st day of September and for each year thereafter on or before the 1st day of July of that year, which shall be based on values of January 1st immediately preceding, and shall certify the same by attaching thereto a certificate in a form to be prescribed by the Tax Commissioner. Such supplementary assessment rolls shall be prepared and certified as may be deemed necessary or expedient.

Section 17. EFFECT OF ASSESSMENT ROLL. All taxes to be levied or collected under this Act shall, except as otherwise provided, be calculated, levied and collected upon the assessments entered in the assessment rolls and certified by the respective assessors as correct, subject to the taxpayers' rights of appeal and to the corrections and amendments made in the rolls pursuant to this Act.

Section 18. PROVISIONS APPLICABLE TO SUPPLEMENTARY ROLLS. All the duties imposed upon the assessor with respect to the annual assessment roll and all the provisions of this Act

relating to assessment rolls shall, so far as applicable, apply to supplementary assessment rolls.

Section 19. CORRECTION OF ERRORS BY ASSESSOR. Any assessor may correct any error, omission or invalidity made or arising in the preparation of the assessment roll at any time before the sitting of the Board. It shall be the duty of every person receiving a notice of assessment to advise the assessor of any error, omission or invalidity he may have observed in the assessment of his property, in order that the assessor may correct the same.

Section 20. TRANSMISSION OF ROLL TO THE TAX COMMISSIONER.

(a) A copy of all assessment rolls shall be certified and transmitted to the Tax Commissioner at Juneau not later than one month after the completion of same unless the time for transmission is extended by the Tax Commissioner. This shall be in addition to deposit of the assessment roll for retention in the division as required in Section 22.

(b) All corrections and amendments made in the roll pursuant to this Act or the decisions of the Board or the courts, and which are not shown on the assessment roll deposited with the collector or upon the copy transmitted to the Tax Commissioner at Juneau, shall be forthwith reported to the collector by the assessor.

Section 21: VALIDITY OF ASSESSMENT ROLLS. Every assessment roll as completed and certified by the assessor, and as corrected and amended by him from time to time in conformity

with this Act and the decisions of the Board shall, except insofar as the same may be further amended on appeal to the court, be valid and binding on all persons, notwithstanding any defect, error, omission or invalidity existing in the assessment roll or any part thereof, and notwithstanding any proceedings pertaining thereto.

Section 22. DEPOSIT OF ROLL WITH COLLECTOR. Upon a completed assessment roll being amended by the assessor in conformity with the decisions of his Board, the assessor shall deliver the roll to the collector, for retention in the division to which it applies, and the roll shall be open during office hours to the inspection of all taxpayers of the division.

Section 23. SITTINGS AND RECORDS OF BOARD. For the purpose of scrutinizing the assessment roll and its supplements, and taking corrective action thereon, or for hearing appeals in respect of any assessment rolls, or from any assessment made under this Act, the Board in each division shall sit and adjourn from time to time as its business may require, and shall record its proceedings and decisions. During all periods when a Board is not in session, its records and decisions shall be kept by the assessor.

Section 24. NOTICES BY BOARD.

(a) Where the name of any person is ordered by the Board to be entered on the assessment roll, by way of addition or substitution, for the purpose of assessment, the Board shall cause notice thereof to be

mailed by the assessor to that person or his agent in like manner as provided in Section 15, giving him at least 60 days from the date of such mailing within which to appeal to the Board against the assessment.

(b) Whenever it appears to the Board that there are overcharges or errors or invalidities in the assessment roll, or in any of the proceedings leading up to or subsequent to the completion of the roll, and there is no appeal before the Board in which the same may be dealt with, the Board may notify parties affected with the view of hearing them.

Section 25. APPEAL BY PERSON ASSESSED.

(a) Any person whose name appears on the assessment roll for any division or who is assessed in any district, may appeal to the Board with respect to any alleged overcharge, error, omission or neglect of the assessor.

(b) Notice of appeal, in writing, shall be filed with the Board within 60 days after the date on which the assessor's notice of assessment was given to the person appealing. Such notice must contain a certification that a true copy thereof was mailed or delivered to the assessor. If notice of appeal is not given within that period, right of appeal shall cease, unless it is shown to the satisfaction of the Board that the taxpayer was unable to appeal within the time so limited.

(c) A copy of the notice of appeal must be sent to the assessor as above indicated.

Section 26. **APPEAL RECORD.** Upon receipt of the notice of appeal, the assessor shall make a record of the same in such form as the Tax Commissioner may direct, which record shall contain all the information shown on the assessment roll in respect of the subject matter of the appeal, and the assessor shall place the same before the Board from time to time as may be required by the Board.

Section 27. **NOTICE OF HEARING.** Not less than 30 days before the sittings at which the appeal is to be heard, the Board shall cause a notice to be mailed by the assessor to the person by whom the notice of appeal was given, and to every other person in respect of whom the appeal is taken, to their respective addresses as last known to the assessor. The form of such notice shall be prescribed by the Tax Commissioner.

Section 28. **HEARING OF APPEAL.**

(a) At the time appointed for the hearing of the appeal, the Board shall hear the appellant, the assessor, other parties to the appeal and their witnesses, and consider the testimony and evidence adduced, and shall determine the matters in question on the merits and render its decision accordingly.

(b) If any party to whom notice was mailed as above set forth fail to appear, the Board may proceed with the hearing in his absence.

(c) The burden of proof in all cases shall be upon the party appealing.

Section 29. ENTRY OF DECISIONS. The Board shall from time to time enter in the appeal record its decisions upon appeals brought before it, and shall certify to the same. The assessor, upon receipt of the appeal record, and subject in every case to any appeal taken to the courts, shall enter in the assessment roll such amendments as may be necessary to give effect to the decisions of the Board.

Section 30. COLLECTION UNAFFECTED BY APPEAL. Neither the giving of a notice of appeal by any taxpayer, nor any delay in the hearing of the appeal by the Board shall in any way affect the due date, the delinquency date, the interest, or any liability for payment provided by this Act in respect of any tax which is the subject matter of the appeal. In the event of the tax being set aside or reduced by the Board on appeal, the Tax Commissioner shall refund to the taxpayer the amount of the tax or excess tax paid by him, and of any interest imposed and paid on any such tax or excess.

Section 31. APPEAL TO COURT. Any person feeling aggrieved by any order of the Board shall have the right of appeal on a de novo basis to the District Court for the Territory of Alaska in the division in which the matter is pending. Such appeal shall be pursued as nearly as may be in accordance with the procedure prescribed in Sections 68-9-4 to 68-9-14 inclusive, Alaska Compiled Laws Annotated 1949, governing appeals from a Justice's Court in civil cases and the Tax Commissioner shall promul-

gate uniform regulations adapting the above referenced procedure for perfecting such appeals.

Section 32. TIME OF PAYMENT. Taxes for a calendar year shall be payable annually the first day of February of the ensuing year. Failure to pay on said due date shall cause the tax to become delinquent and shall subject the property assessed to the interest and penalty additions hereinafter provided. Payments of taxes may be made at any time before their due date, but no discount shall be allowed for such early payment.

Section 33. MODE OF PAYMENT. All taxes payable under this Act shall be paid in lawful money of the United States or its equivalent, at the office of the collector in the judicial division in which same are due.

Section 34. LIEN.

(a) The taxes assessed upon property, together with interest and penalty, shall be a lien thereon from and after assessment until paid, and no sale or transfer of such property shall in any way affect the lien of such taxes.

(b) Liens for taxes hereunder shall be first liens and paramount to all prior and subsequent encumbrances, alienations and descents of the property.

Section 35. INTEREST.

(a) For failure to pay taxes when due, interest inclusive of penalty at the rate of one per cent per month shall be added on the first of each month until

the tax is paid or the property sold hereunder, but not to exceed the legal rate of interest in the aggregate.

(b) Where a tax becomes payable in respect to property assessed on a supplementary assessment roll, the like interest shall be added to and recovered as a part of the tax as might have been imposed if the return and the assessment had been made at the time prescribed by this Act and the tax had been duly levied and had not been paid.

Section 36. FAILURE OR REFUSAL TO COMPLY WITH ACT. Every person who, without reasonable excuse, in violation of any provision of this Act or of the regulations made thereunder—

(a) refuses or fails to make any return required to be made; or,

(b) in the making of any return, or otherwise, wilfully withholds any information necessary for ascertaining the true taxable amount of any property; or,

(c) refuses or fails to furnish to the assessor or his employee or agent any access, facility, or assistance required for the purpose of an entry on or examination of property or records; or,

(d) refuses or fails to attend or submit himself to examination on oath or otherwise by the assessor, the Board or the Tax Commissioner when duly cited so to do;—shall, in addition to penalties otherwise prescribed herein, be guilty of an offense against this Act.

Section 37. FALSE RETURNS AND RECORDS.

Every person who knowingly and wilfully makes any false or deceptive statement in any return required to be made under this Act, or fraudulently omits to give therein a full and correct statement of the property of the taxpayer, or makes or keeps any false entry or record in any book of account or record required to be kept under this Act, shall be liable, on conviction, to a fine of not less than One Hundred Dollars and not more than One Thousand Dollars.

Section 38. DEFACING POSTED NOTICES.

Every person who, without reasonable excuse, tears down, injures or defaces any advertisement, notice or document which, under the authority of this Act or the regulations made thereunder, is posted in a public place, shall be guilty of an offense against this Act.

Section 39. PENALTY FOR OFFENSES. Every person guilty of an offense against this Act for which no other penalty is specifically provided, shall be liable, on conviction, for a first offense to a fine not exceeding Five Hundred Dollars, and for a second or subsequent offense to a fine of not less than One Hundred Dollars and not more than One Thousand Dollars.

Section 40. LIABILITY OF CORPORATE OFFICERS, ETC. Every director, manager, secretary or other officer of a corporation or association, and every member of a partnership or syndicate, who knowingly and wilfully authorizes or permits any act, default, or refusal which would subject the organiza-

tion to criminal liability hereunder, shall be likewise personally guilty of such offense.

Section 41. **PROSECUTIONS.** Prosecutions hereunder for imposing of fines shall be at the instance of the Tax Commissioner and be brought in the name of the Territory.

Section 42. **RECOVERY OF UNPAID LIENS.** On or after the first day of April of any year, the Tax Commissioner may, with the assistance of the Attorney General, file in the office of the clerk of the district court in the division in which property subject to delinquent taxes is situated, a list of all parcels affected by unpaid liens. Thereafter the Tax Commissioner shall, unless the matter be otherwise resolved, proceed to foreclosure of said liens in substantially the manner prescribed in Sections 22-2-8 to 22-2-18, both inclusive, of Alaska Compiled Laws Annotated 1949, for the foreclosure of land registration liens, and all pertinent provisions of said sections are hereby adopted as applicable hereto.

Section 43. **BOARDS OF ASSESSMENT AND EQUALIZATION.**

(a) There is hereby created and established for each judicial division a Board of Assessment and Equalization.

(b) Each Board shall consist of three members appointed by the Governor subject to confirmation by the majority of the members of both Houses convened in Joint Session, provided, however, that persons appointed may perform the duties of their offices

until action by the ensuing Legislature is taken either confirming or rejecting such appointments.

(1) Board members shall be appointed solely on the grounds of fitness to perform the duties of the office.

(2) In the event of a vacancy on any Board, a successor shall be appointed to serve for the balance of the unexpired term.

(c) The term of each Board member shall be six years, except as hereinafter provided, but any person duly appointed and qualified shall hold office until his successor is appointed and qualified. No Board member shall be eligible to serve more than one six-year term.

(1) The terms of the members first appointed for each Board shall begin when they are appointed and qualified and shall continue for the following periods: one until March 31, 1951, one until March 31, 1953, and one until March 31, 1955.

(2) A Board member may be removed from office by the Governor after notice and opportunity for hearing, upon grounds of inefficiency, neglect of duty, malfeasance in office, but for no other cause whatever.

(d) The principal offices of the respective Boards shall be located in the following cities: for the First Judicial Division at Juneau, for the Second Judicial Division at Nome, for the Third Judicial Division at Anchorage, and for the Fourth Judicial Division at Fairbanks.

(e) The compensation of each Board member shall be \$15.00 for each day actually spent in the performance of his duties, including all the time away from his place of residence in connection therewith, together with per diem and travel expense payable in accordance with vouchers issued by the Tax Commissioner.

(f) Each Board, within its judicial division, shall have the power and duty, subject to the approval of the Tax Commissioner as to all expenses of Board operations, to:—

(1) Exercise general supervision and direct the activities of assessment and equalization of property taxes;

(2) select an employee or employees or enter into contracts with qualified persons to perform the functions of appraiser and assessor; provided, that persons so appointed shall have the technical and other qualifications prescribed by the Tax Commissioner, and be engaged at rates of compensation prescribed by the Tax Commissioner;

(3) keep an accurate and complete record of all Board business, orders and processes, which records shall be open to public inspection at all reasonable times;

(4) hold hearings and conduct investigations required in the administration of the assessment provisions of this Act and hear and determine appeals involving assessment of property, at such points in their respective divisions as will serve the general

convenience of the public, provided that written minutes may be kept of the testimony of witnesses without making a word by word record thereof;

(5) require attendance of witnesses and production of all necessary evidence at any hearings and administer oaths in the course of investigations conducted or hearings held pursuant to the provisions of this Act;

(6) require such searches and appraisements by the assessor as the Board sees fit;

(7) require officers and employees of incorporated cities and districts to furnish such information concerning assessment and equalization of property taxes as is deemed necessary;

(8) perform all duties specifically imposed and exercise all powers conferred upon the Board.

Section 44. TAX COMMISSIONER. The Tax Commissioner shall be the collector of taxes levied under this Act and enforce collections with the aid of such divisional collectors or other deputy collectors and personnel as he may see fit to appoint. He shall administer all provisions of this Act except those specifically assigned to a Board or under the purview of municipal or school district authority. The Tax Commissioner shall prescribe and furnish all necessary forms, and promulgate and publish all needful rules and regulations conformable herewith for the assessment and collection of any tax herein imposed, and shall voucher for expenditures according to law.

Section 45. SEVERABILITY CLAUSE. If any provisions of this Act, or the application thereof to any person or circumstance is held invalid, the remainder of the Act and such application to other persons or circumstances shall not be affected thereby.

Section 46. EMERGENCY CLAUSE. An emergency is hereby declared to exist and this Act shall take effect immediately upon its passage and approval.

Approved February 21, 1949.

Appendix "A" "1"

CHAPTER 88, SESSION LAWS OF ALASKA, 1949.

Section 1. Section 3 of the Alaska Property Tax Act which was House Bill No. 2 of this session of the Legislature, is hereby amended by adding thereto at the end thereof the following language:

With respect to any boat or vessel engaged in marine service on a commercial basis and subject to the provisions of this Act, the owner of said boat or vessel may elect:

(a) To pay the tax levied hereunder on such boat or vessel on the basis of the value thereof as defined herein, or,

(b) To pay \$4.00 per net ton of such vessel's registered tonnage, but in any event the amount payable hereunder, for each such boat or vessel, shall not be less than \$20.00 per annum.

Approved March 23, 1949.

Appendix "B"

SECTION 16-1-121, ALASKA COMPILED LAWS ANNOTATED, 1949
(SECTION 73, CHAPTER 97, SESSION LAWS OF ALASKA,
1923).

“Whenever the tax on real property shall not have been paid when due, the councils of municipal corporations, in addition to the remedies now allowed by law, may enforce the lien of such tax by the sale of the property assessed, such sale to be made under the special proceeding hereinafter set forth, by order of the District Court of the division wherein the property assessed is situated.”

Appendix "C"

SECTION 22-2-8, ALASKA COMPILED LAWS ANNOTATED, 1949
(SECTION 9, CHAPTER 49, SESSION LAWS OF ALASKA,
1945).

“§22-2-8. List of delinquent penalties: Filing and posting: Effect as notice and complaint. On the first day of August 1948, and on each August 1 thereafter, the Territorial Treasurer, by the Attorney General of Alaska, shall file in the office of the Clerk of the division of the District Court in which the property subject to such liens is situated, a list of all parcels of property affected by unpaid liens, which on such date have been unpaid for a period of at least four years or more after the date the penalties and other legal charges represented thereby became due and payable. Such parcels shall be numbered serially. The treasurer shall post a certified copy of such list in his office and in the office of the register of the District Land Office. Such list shall be known and designated as the ‘List of Delinquent Penalties’ and shall be captioned as an action in the appropriate division of the District Court. The action shall be entitled: ‘In the matter of foreclosure of liens pursuant to Section 8 of the Alaska Real Property Registration Law by the Territory of Alaska. List of delinquent penalties for 19.....’ Such list of delinquent penalties shall be verified by the affidavit of the Treasurer. The filing of such list of delinquent penalties in the office of the Clerk of the District Court of the division in which the property subject to such liens is situated shall constitute and have the same force and effect as the

filing and reporting in said office of an individual and separate notice of pendency of action and as the filing in such court of an individual and separate complaint against the real property therein described to enforce the payment of delinquent penalties which have become liens against such property.”

Appendix "D"

SECTION 56-2-1, ALASKA COMPILED LAWS ANNOTATED, 1949.

“Actions by public corporations: Causes. An action may be maintained by any incorporated town, school district, or other public corporation of like character in the Territory in its corporate name, and upon a cause of action accruing to it in its corporate character, and not otherwise, in either of the following cases:

First. Upon a contract made with such public corporation;

Second. Upon a liability prescribed by law in favor of such public corporation;

Third. To recover a penalty or forfeiture given to such public corporation;

Fourth. To recover damages for an injury to the corporate rights or property of such public corporation.”

[Section 1165; Compiled Laws of Alaska 1913.]

Appendix "E"

SECTION 16-1-35 (9)* (CHAPTER 66, SESSION LAWS OF ALASKA 1925, AS AMENDED).

"Ninth: [General tax for school and municipal purposes.] To assess, levy, and collect a general tax for school and municipal purposes not to exceed two per centum of the assessed valuation upon all real and personal property, and to enforce the collection of such lien by foreclosure, levy, distress and sale. Provided, however, that all property belonging to the municipality or the Territory, and the household furniture of the head of the family or a householder, not exceeding Two Hundred Dollars (\$200.00) in value, as well as all property used exclusively for religious, educational, charitable purposes and the property of any organization, not organized for business purposes, whose membership is composed entirely of the veterans of any wars of the United States, or the property of the auxiliary of any such organization and all monies on deposit, shall be exempt from taxation. Provided, further, that if any organization composed of veterans or its auxiliary derives any rentals or profits from any such property owned by it or them, such property shall not be exempt.

"Provided further, that the laws excepting certain property from levy and sale on execution shall not apply to taxes or to the collection of the same, or to any taxes levied by a municipal corporation."

*Subsequent amendments after the year 1949 are not included herein for the reason they were not considered by the District Court in deciding the *City of Yakutat v. Libby, McNeill & Libby, et al.*, 13 Alaska 378, 98 F. Supp. 1011.

Appendix "F"

31 STAT. 321, 521, SECTION 201.

"Sec. 201. The council shall have the following powers:

First. To provide suitable rules governing their own body, and to elect one of their members president, who shall be *ex officio* mayor.

Second. They may appoint, and at their pleasure remove, a clerk, treasurer, assessor, and such other officers as they deem necessary.

Third. To make rules for all municipal elections: *Provided*, No officer shall be elected for a longer term than one year.

Fourth. By ordinance to provide for necessary street improvements, fire protection, water supply, lights, wharfage, sewerage, maintenance of public schools, protection of public health, police protection, and the expense of assessment and collection of taxes.

Fifth. To impose and collect a poll tax on electors, tax on dogs, a general tax on real and personal property, possessory rights and improvements, and such license tax on business conducted within the corporate limits as the council may deem reasonable: *Provided*, No such tax shall exceed one per centum on the assessed valuation of property, and all assessments made by the corporation assessor shall be subject to review by the council, and appeals may be taken from their decisions to the district court: *Provided further*, No bonded indebtedness whatever shall be authorized for any purpose."

Appendix "G"

HOUSE BILL NO. 3.

January 27, 1943, pg. 45

"HOUSE BILL NO. 3 by Mr. Hurley, entitled:

'An Act to repeal Chapter 10, Session Laws of Alaska, 1949, as amended by Chapter 88, Session Laws of Alaska, 1949, and abrogating and repealing all accrued and unpaid taxes levied thereunder, and declaring an emergency.'

was introduced, read the first time and referred to the Committee on Judiciary and Federal Relations, to be later referred to the Ways and Means Committee."

January 29, 1953, pg. 103

"The Committee on Judiciary and Federal Relations reported HOUSE BILL NO. 3 back to the House with the recommendation that it do pass with the following amendments:

The title be changed to read:

'An Act to repeal the Alaska Property Tax Act enacted by Chapter 10, Session Laws of Alaska, 1949, as amended by Chapter 88, Session Laws of Alaska, 1949, and declaring an emergency.'

Section 2 of HOUSE BILL NO. 3 be deleted.

The report was signed by Mr. Hurley, Chairman, and concurred in by Messrs. Eastaugh, Strainger and Pollock; Mr. Kay recommending that it do not pass.

HOUSE BILL NO. 3 was referred to the Committee on Ways and Means."

February 4, 1953, pg. 142

“The Committee on Ways and Means, to whom was referred HOUSE BILL NO. 3, reported the same back to the House with the recommendation that it do pass in accordance with amendments proposed by the Judiciary Committee. The report was signed by Mr. Johnson, Chairman, and concurred in by Messrs. Rutherford, Locken, Wilbur, McKinley, Boardman, Rentschler, Mrs. Bullock and Miss Prior.

HOUSE BILL NO. 3 was placed on the calendar for second reading.”

February 5, 1953, pg. 152

“HOUSE BILL NO. 3 was read the second time.

At the request of Mr. Rutherford and by unanimous consent the following amendments to HOUSE BILL NO. 3, recommended by the Judiciary Committee, were adopted:

Change the title to read: ‘An Act to repeal the Alaska Property Tax Act enacted by Chapter 10, Session Laws of Alaska, 1949, as amended by Chapter 88, Session Laws of Alaska, 1949, and declaring an emergency.’

Delete Section 2.

At the request of Mr. Hendrickson, Mr. H. L. Faulkner of Juneau was given the privilege of the floor to give information as to HOUSE BILL NO. 3.

It was moved by Mr. Greuel, seconded by Mr. Kay, that the following amendment to HOUSE BILL NO. 3, offered by Mr. Greuel, be adopted:

Delete emergency clause on lines 22, 23 and 25 and insert in its place: 'This Act shall become effective January 1, 1954.'

Change Title, deleting words 'and declaring an emergency.' and substitute 'and establishing an effective date.'

Motion lost.

HOUSE BILL NO. 3 was referred to Committee on Engrossment and Enrollment for engrossment."

February 7, 1953, pg. 175

"The Committee on Engrossment and Enrollment, to whom were referred * * * HOUSE BILL NO. 3, reported that it had found * * * HOUSE BILL NO. 3 correctly engrossed.

* * * HOUSE BILL NO. 3 was placed on calendar for third reading."

February 9, 1953, pg. 192

"It was moved by Mr. Boardman, seconded by Mr. Greuel, that HOUSE BILL NO. 3, on today's Calendar for third reading be re-committed to second reading for the following specific amendment offered by Mr. Boardman:

After word 'Repealed' on line 15, change the period to a semi-colon and add: 'provided, however, that all incentive exemptions granted by the Tax Commissioner under the provisions of subdivision (h), Section 6, Chapter 10, Session Laws of 1949, shall continue in full force and effect for the periods and under the terms con-

tained therein, and all such exemptions which have been so granted within a city, school district or public utility district shall remain in full force and effect and shall be binding upon the city, school district or public utility district where granted and apply to all municipal, school district and public utility district property taxes in the same manner as exemptions where intended to apply to Territorial property taxes levied by Chapter 10, Session Laws of 1949.'

Motion carried.

It was moved by Mr. Boardman, seconded by Mrs. Bullock, that the foregoing amendment be adopted.

It was moved by Mr. Eastaugh, seconded by Mr. Kay, that HOUSE BILL NO. 3 be continued in second reading. Motion carried."

February 10, 1953, pg. 203

"Second reading of HOUSE BILL NO. 3, continued.

The question before the House being, 'Shall the amendment to HOUSE BILL NO. 3, offered by Mr. Boardman, be adopted?' The roll was called with the following result:

Yeas, 11—Boardman, Bullock, Duffield, Eastaugh, Fagerstrom, Greuel, Hendrickson, Johnson, Kay, Olsen, Rentschler.

Nays, 13—Coghill, Dimock, Hurley, Locken, MacSpadden, McKinley, Pollock, Prior, Rutherford, Snodgrass, Stringer, Wilbur, Mr. Speaker.

Motion lost.

It was moved by Mr. Wilbur, seconded by Mr. Kay, that the Attorney General be requested to appear before the House to give information as to HOUSE BILL NO. 3. The roll was called on the motion with the following result:

Yeas, 13—Boardman, Coghill, Duffield, Eastaugh, Fagerstrom, Greuel, Hendrickson, Johnson, Kay, Rentschler, Rutherford, Stringer, Wilbur.

Nays, 11—Bullock, Dimock, Hurley, Locken, MacSpadden, McKinley, Olsen, Pollock, Prior, Snodgrass, Mr. Speaker.

Motion carried. Mr. Kay thereupon gave notice of his intention to move a reconsideration of his vote on the motion.”

* * * * *

“It was moved by Miss Prior, seconded by Mr. Wilbur, that the rules be suspended and the vote on Mr. Kay’s reconsideration be taken immediately. The roll was called on the motion with the following result:

Yeas, 17—Bullock, Coghill, Dimock, Eastaugh, Hendrickson, Hurley, Johnson, MacSpadden, McKinley, Olsen, Prior, Rentschler, Rutherford, Snodgrass, Stringer, Wilbur, Mr. Speaker.

Nays, 7—Boardman, Duffield, Fagerstrom, Greuel, Kay, Locken, Pollock.

Motion carried.

The question being, ‘Shall the Attorney General be requested to appear to give information as to HOUSE BILL NO. 3?’ The roll was called with the following result:

Yeas, 14—Boardman, Bullock, Coghill, Eastaugh, Hendrickson, Johnson, Locken, McKinley, Olsen, Rentschler, Rutherford, Stringer, Wilbur, Mr. Speaker.

Nays, 10—Dimock, Duffield, Fagerstrom, Greuel, Hurley, Kay, MacSpadden, Pollock, Prior, Snodgrass.

Motion carried and the Sergeant at Arms was instructed to request the Attorney General to appear before the House.

* * * * *

Attorney General, J. Gerald Williams, appeared before the House to answer questions with reference to HOUSE BILL NO. 3."

February 11, 1953, pg. 218

"Second reading of HOUSE BILL NO. 3 continued.

It was moved by Mr. Hurley, seconded by Miss Prior, that the rules be suspended as to HOUSE BILL NO. 3, that it be considered engrossed, read the third time and placed upon final passage. Motion carried.

HOUSE BILL NO. 3 was read the third time.

Upon motion by Miss Prior, seconded by Mrs. Bullock, the previous question was ordered. The question being, 'Shall the Bill pass?', the roll was called with the following result:

Yeas, 20—Boardman, Bullock, Coghill, Dimock, Eastaugh, Hendrickson, Hurley, Johnson, Locken, MacSpadden, McKinley, Olsen, Pollock, Prior, Rent-

schler, Rutherford, Snodgrass, Stringer, Wilbur, Mr. Speaker.

Nays, 4—Duffield, Fagerstrom, Greuel, Kay.

And so the Bill passed.

The question then being ‘Shall the emergency clause be adopted, the roll was called with the following result:

Yeas, 20—Boardman, Bullock, Coghill, Dimock, Eastaugh, Hendrickson, Hurley, Johnson, Locken, MacSpadden, McKinley, Olsen, Pollock, Prior, Rentschler, Rutherford, Snodgrass, Stringer, Wilbur, Mr. Speaker.

Nays, 4—Duffield, Fagerstrom, Greuel, Kay.

And so the emergency clause was adopted.

There being no objection thereto, the title of the Bill was ordered to stand as the title of the Act.

HOUSE BILL NO. 3 had been reported correctly engrossed on February 7th and on February 9th had been re-committed to second reading for specific amendment. The specific amendment was not adopted, so the Speaker announced that he had signed HOUSE BILL NO. 3 and ordered the same sent to the Senate.”

SENATE ACTION ON HOUSE BILL NO. 3

February 12, 1953, pg. 172

“HOUSE BILL NO. 3 by Mr. Hurley, entitled: ‘An Act to repeal the Alaska Property Tax Act enacted by Chapter 10, Session Laws of Alaska,

1949, as amended by Chapter 88, Session Laws of Alaska, 1949, and declaring an emergency,'

was read the first time and referred to the Committee on Judiciary and Federal Relations."

February 19, 1953, pg. 244

The Committee on Judiciary and Federal Relations to whom was referred HOUSE BILL NO. 3 returned the same to the Senate with the report it had found HOUSE BILL NO. 3 in proper legal form and recommended the following amendments:

Insert new Section 2 as follows:

Section 2. Section 1 of this Act shall not be applicable to:

(a) any taxes which have been levied and assessed by any municipality, school or public utility district under the provisions of Chapter 10, Session Laws of Alaska 1949, as amended, or which are levied and assessed during the current fiscal year of such municipality, school or public utility district; and

(b) any exemptions from the taxes referred to in sub-section (a) of this section, which have been granted under the provisions of Section 6 (h) of Chapter 10, Session Laws of Alaska 1949.

The report was signed by Senator Stepovich, Chairman, and concurred in by Senators Jensen, Jones and Robison. HOUSE BILL NO. 3 was ordered placed on the Daily File for second reading."

February 20, 1953, pg. 261

“HOUSE BILL NO. 3 was read the second time.

Senator Egan asked unanimous consent to have HOUSE BILL NO. 3 re-submitted to the Committee on Taxation and Revenue.

Objection was voiced.

Senator Egan so moved; seconded by Senator Nolan.

The question being, ‘Shall Senator Egan’s motion to re-submit HOUSE BILL NO. 3 to the Committee on Taxation and Revenue pass?’, the roll was called with the following result:

Yeas, 10—Barnes, Beltz, Butrovich, Coble, Egan, Engstrom, Ipalook, Lhamon, Lyng, Nolan.

Nays, 6—Gorsuch, Jensen, Robison, Snider, Stepovich, Mr. President.

And so the Motion carried, and HOUSE BILL NO. 3 was re-submitted to the Committee on Taxation and Revenue.”

February 25, 1953, pg. 309

“The Committee on Taxation and Revenue reported HOUSE BILL NO. 3 back to the Senate without recommendation but that the amendments offered by the Judiciary Committee be adopted. The report was signed by Senator Engstrom, Chairman, and concurred in by Senators Lhamon and Ipalook; Senator Robison recommended that it do pass. HOUSE BILL NO. 3 was placed on the Daily File for second reading.”

February 26, 1953, pg. 338

“HOUSE BILL NO. 3 was read the second time.

Senator Stepovich asked unanimous consent for the adoption of the amendment offered by the Committee on Judiciary and Federal Relations as follows:

Insert new Section 2 as follows:

Section 2. Section 1 of this Act shall not be applicable to:

(a) any taxes which have been levied and assessed by any municipality, school or public utility district under the provisions of Chapter 10, Session Laws of Alaska 1949, as amended, or which are levied and assessed during the current fiscal year of such municipality, school or public utility district; and

(b) any exemptions from the taxes referred to in sub-section (a) of this section, which have been granted under the provisions of Section 6 (h) of Chapter 10, Session Laws of Alaska, 1949. Renumber present Section 2 to Section 3.

There being no objection, the amendments were adopted.

At the request of Senator Egan and with unanimous consent of the Senate, HOUSE BILL NO. 3 will be held in second reading for further amendments.”

February 28, 1953, pg. 363

“HOUSE BILL NO. 3 was again considered in second reading.

The following amendment was offered by Senator Stepovich:

Page 1, Line 9. After '1949' remove the comma, insert a semi-colon, and then add the following: 'excepting from repeal certain taxes and tax exemptions'.

Senator Stepovich asked unanimous consent for the adoption of the amendment. There being no objection, the amendment was adopted.

HOUSE BILL NO. 3 was referred to the Committee on Engrossment and Enrollment for engrossment."

March 3, 1953, pg. 383

"The Committee on Engrossment and Enrollment reported that it had found * * * HOUSE BILL NOS. * * * 3 * * * correctly engrossed. * * * HOUSE BILL NOS. * * * 3 * * * were placed on the General File."

March 5, 1953, pg. 435

"HOUSE BILL NO. 3 was read the third time.

At the request of Senator Snider and with unanimous consent of the Senate, Mr. H. L. Faulkner, Juneau attorney, was given the privilege of the floor to speak on HOUSE BILL NO. 3.

* * * * *

HOUSE BILL NO. 3 was continued and Mr. Faulkner concluded his talk on same.

Senator Egan asked unanimous consent of the Senate that the Attorney General of Alaska be heard on HOUSE BILL NO. 3. There being no objection, it

was so ordered and the Senate recessed until the Attorney General was summoned.

* * * * *

HOUSE BILL NO. 3 (continued)

Attorney General J. Gerald Williams was given the privilege of the floor to speak on HOUSE BILL NO. 3.

* * * * *

HOUSE BILL NO. 3 (Continued).

Mr. A. J. ('Tiny') Chichoski, member of the United Fishermen of Alaska, from Kodiak, was heard on HOUSE BILL NO. 3.

Senator Barnes assumed the Chair to permit the President to be heard on HOUSE BILL NO. 3.

The President resumed the Chair.

The question being, 'Shall HOUSE BILL NO. 3 pass the Senate?', the roll was called with the following result:

Yeas, 10—Barnes, Coble, Gorsuch, Jensen, Lhamon, Lyng, Robison, Snider, Stepovich, Mr. President.

Nays, 6—Beltz, Butrovich, Egan, Engstrom, Ipalook, Nolan.

And so the Bill passed.

The Secretary called the roll on the emergency clause with the following result:

Yeas, 12—Barnes, Butrovich, Coble, Engstrom, Gorsuch, Jensen, Lhamon, Lyng, Robison, Snider, Stepovich, Mr. President.

Nays, 4—Beltz, Egan, Ipalook, Nolan.

And so the emergency clause was adopted.

There being no objection thereto, the title of the Bill was ordered to stand as the title of the Act.”

HOUSE ACTION ON HOUSE BILL NO. 3.

March 6, 1953, pg. 516

“A message from the Senate was read, transmitting HOUSE BILL NO. 3, which had passed the Senate with the following amendments:

Section 2. Section 1 of this Act shall not be applicable to:

(a) any taxes which have been levied and assessed by any municipality, school or public utility district under the provisions of Chapter 10, Session Laws of Alaska 1949, as amended, or which are levied and assessed during the current fiscal year of such municipality, school or public utility district; and

(b) any exemptions from the taxes referred to in subsection (a) of this section, which have been granted under the provisions of Section 6(h) of Chapter 10, Session Laws of Alaska 1949.

Renumber present Section 2 to Section 3

Page 1, line 9, after ‘1949’ remove the comma, insert semicolon, and add the following:

‘excepting from repeal certain taxes and tax exemptions’.

It was moved by Mr. Rutherford, seconded by Mr. Eastaugh, that that House concur in Senate amendments to HOUSE BILL NO. 3. The roll was called on the motion with the following result:

Yeas, 22—Boardman, Bullock, Coghill, Dimock, Duffield, Eastaugh, Fagerstrom, Greuel, Hendrickson, Johnson, Locken, MacSpadden, McKinley, Olsen, Pollock, Prior, Rentschler, Rutherford, Snodgrass, Stringer, Wilbur, Mr. Speaker.

Nays, 1—Kay.

Absent, 1—Hurley.

And so the House concurred and HOUSE BILL NO. 3 was ordered enrolled."

March 7, 1953, pg. 525

"The Committee on Engrossment and Enrollment reported that it had found * * * HOUSE BILLS NOS. 3 * * * correctly enrolled. * * *

The Speaker announced that he had signed * * * HOUSE BILLS NOS. 3 * * * and ordered the same sent to the Senate for the signatures of the President and Secretary.

* * * * *

A message from the Senate was read transmitting the enrolled copies of * * * HOUSE BILLS NOS. 3 * * * signed by the President and Secretary. Said Bills were ordered sent to the Governor."

March 11, 1953, pg. 580

“The following message from the Governor was read:

‘TERRITORY OF ALASKA

Office of the Governor

JUNEAU

March 11, 1953

Speaker of the House
Twenty-First Territorial Legislature
Juneau, Alaska

Dear Mr. Speaker:

In my message to the Legislature I touched generally on a few of the points which seemed to warrant retention of the property tax. Nor do I desire to repeat those in detail beyond mention that our well rounded tax structure, which has received expressions of approval from members of the Congress, will, if this tax is repealed, be no longer so well diversified, so well balanced, and so widely distributed if one of the three basic elements is removed. In addition, it may be noted that there is no place in the union where a real property tax is not levied, either by the state or its lesser subdivisions, or both, and few places where it is so low as 1%. Our sister Territory, Hawaii, has an elaborate tax structure which features a tax on real property. In my Message I likewise referred to the fact that Congress looks to Alaska to participate increasingly in its own financing as a token of good faith, warranting continued federal expenditures in the Territory. Some of these expenditures, which we in Alaska consider essential, are now in jeopardy: we

should do nothing further to jeopardize them. It is also apparent that despite our substantial surplus that the growing needs of the Territory are being recognized by this Legislature and that we are embarking on a perilous course if at the very outset of our era of growing population and expansion we rescind one important and substantial source of revenue. I would also like to stress the value of the property tax, beyond its revenue, in furnishing the Territory with the important machinery for determining and keeping current a record of property ownerships.

However, there is one entirely new point which I have not hitherto touched, which I feel the Legislature should consider. That is the matter of discrimination which would automatically follow repeal of the property tax.

In the fifteen year period, between 1934 and 1949—that is to say, before the enactment of the Territorial Property Tax—people living in municipalities and school districts were obliged to pay, by way of municipal and school district taxes, one-third of the cost of operating and maintaining their schools while the Territory contributed the remaining two-thirds. During this same period persons residing outside of cities or school districts paid no property taxes and thus contributed nothing directly for the support of their schools. The entire cost of construction, repair, operation and maintenance, was borne by the Territory. This means that the people living in municipalities and school districts were paying not only for their own schools but through general taxation for the rural schools as well. A typical example of this discrimination, should the prop-

erty tax be repealed, is called to my attention by Admiral (Squeaky) Anderson, who pointed out that the cannery which he operates within the city limits of Seldovia has been paying property taxes, while two other canneries just outside the local limits will, if the tax is repealed, make no such contribution. We may well ask whether such a practice is equitable and fair.

I have on hand also an unsolicited letter from a man with whom I am not personally acquainted, from Petersburg, who writes me as follows:

“As a taxpayer of both real estate and of a documented vessel, taxable under the Alaska General Property Tax Act, I implore you to veto the bill recently passed by the Alaska Legislature repealing the General Property Tax. Speaking from personal experience I can truthfully say that this repeal act is not in accordance with wishes of the people in my community.”

So the fact is that the repeal of the property tax will not remove any discrimination but will recreate one against all Alaskans living in urban and suburban communities. The real effect of the enactment of that law four years ago was to remove discrimination and to distribute more equitably the cost of government over all inhabitants in the Territory.

Those urban and suburban taxpayers constitute a substantial majority of the people of Alaska. By repeal of the property tax they will be discriminated against in favor of the far smaller number living outside of incorporated cities and school districts. It is difficult for me to justify so manifest an injustice.

It is therefore with regret that I am obliged to veto H. B. 3, an Act to Repeal the General Property Tax.

Sincerely yours,
s/ ERNEST GRUENING,
Governor of Alaska.'

Mr. Wilbur asked for a call of the House, and the Veto Message was made a first order of business at 11:00 A.M. today.

SPECIAL ORDER OF BUSINESS

The question now being, 'Shall HOUSE BILL NO. 3 pass the House notwithstanding the veto of the Governor?', the roll was called with the following result:

Yeas, 20—Boardman, Bullock, Coghill, Dimock, Eastaugh, Hendrickson, Hurley, Johnson, Locken, MacSpadden, McKinley, Olsen, Pollock, Prior, Rentschler, Rutherford, Snodgrass, Stringer, Wilbur, Mr. Speaker.

Nays, 4—Duffield, Fagerstrom, Greuel, Kay.

And so the Bill passed.

The question then being, 'Shall the emergency clause be adopted?', the roll was called with the following result:

Yeas, 20—Boardman, Bullock, Coghill, Dimock, Eastaugh, Hendrickson, Hurley, Johnson, Locken, MacSpadden, McKinley, Olsen, Pollock, Prior, Rentschler, Rutherford, Snodgrass, Stringer, Wilbur, Mr. Speaker.

Nays, 4—Duffield, Fagerstrom, Greuel, Kay.

And so the emergency clause was adopted.

The House having passed HOUSE BILL NO. 3 notwithstanding the veto of the Governor, the Chief Clerk was instructed to so advise the Senate."

SENATE ACTION ON GOVERNOR'S VETO ON H. B. NO. 3

March 12, 1953, pg. 561

"SENATOR Engstrom asked unanimous consent that the Rules be suspended and that HOUSE BILL NO. 3 and the Governor's Veto Message be considered at this time. There being no objection, it was so ordered.

* * * * *

Senator Engstrom moved that the Senate pass HOUSE BILL NO. 3, the Governor's veto notwithstanding, seconded by Senator Barnes.

The question being, 'Shall HOUSE BILL NO. 3, the Governor's veto notwithstanding, pass the Senate?', the roll was called with the following result:

Yeas, 11—Barnes, Coble, Engstrom, Gorsuch, Jensen, Lhamon, Lyng, Robison, Snider, Stepovich, Mr. President.

Nays, 4—Beltz, Butrovich, Egan, Nolan.

Not Voting, 1—Ipalook.

And so the Motion carried and the Bill passed, the Governor's veto notwithstanding.

The President ordered HOUSE BILL NO. 3 returned to the House."

Appendix "H"

**SECTION 19-1-1 ALASKA COMPILED LAWS ANNOTATED, 1949,
AS AMENDED BY CHAPTER 4 SLA—EX. SESSION, 1955**

“Section 1. Section 19-1-1 ACLA 1949 is hereby amended to read as follows:

Sec. 19-1-1. Effect of repeals or amendments. The repeal or amendment of any statute shall not affect any offense committed or any act done or right accruing or accrued or any action or proceeding had or commenced prior to such repeal or amendment; nor shall any penalty, forfeiture or liability incurred under such statute be released or extinguished, but the same may be enforced, continued, sustained, prosecuted and punished under the repealing or amendatory statute save as limited by the ex post facto and other provisions of the Constitution, in which event the same may be enforced, continued, sustained, prosecuted and punished under the former law as if such repeal or amendment had not been made. When any act repealing a former act, section or provision shall be itself repealed, such repeal shall not be construed to revive such former act, section, or provision, unless it shall be expressly so provided.”

No. 15,070

IN THE

United States Court of Appeals
For the Ninth Circuit

TERRITORY OF ALASKA,

Appellant,

VS.

AMERICAN CAN COMPANY, FIDALGO ISLAND
PACKING COMPANY, LIBBY, McNEILL &
LIBBY, INC., NAKAT PACKING COMPANY,
NEW ENGLAND FISH CO., P. E. HARRIS
COMPANY, INC., PACIFIC & ARCTIC RAIL-
WAY & NAVIGATION Co., and OCEANIC
FISHERIES Co.,

Appellees.

Upon Appeal from the District Court for the
Territory of Alaska, First Division.

APPELLEES' BRIEF.

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FILE

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PAUL P. O'BRIEN, C

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IN THE
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NEW ENGLAND FISH CO., P. E. HARRIS
COMPANY, INC., PACIFIC & ARCTIC RAIL-
WAY & NAVIGATION Co., and OCEANIC
FISHERIES Co.,

Appellees.

Upon Appeal from the District Court for the
Territory of Alaska, First Division.

APPELLEES' BRIEF.

STATEMENT OF THE CASE.

Appellant has set forth a reference to the opinion of the District Court and has made the jurisdictional statement required. The appellant's statement of the case is substantially correct particularly as to the nature of the case and the procedural steps previously taken. The reference to the action of the trial

court on the appellant's motion to dismiss the appellees' motion to dismiss the complaints we think is immaterial since it was not error and not assigned as error.

We do take an exception to the statement that appellees abandoned the defense that the action is barred by the statute of limitations. It is true Judge Folta said that this ground had been abandoned. (R. 41.) Appellees at no time abandoned this defense although it was not argued before Judge Folta. Judge Hodge recognized this fact in his opinion of January 4, 1956 (R. 67) where he said "In view of this decision the question of the statute of limitations need not be considered."

Appellant has set forth in the appendix to its opening brief all of the pertinent statutes and extracts from the legislative journals. These will not be repeated herein.

In paragraph three of appellants statement it is said that the case involves eight separate complaints seeking to recover \$175,000 in taxes, interest and penalties for the years 1949, 1950, 1951 and 1952. We call the Court's attention to the fact that these were all personal actions against the several defendants seeking to recover taxes on both real and personal property combined without any attempt at segregation of one type of property from the other.

QUESTIONS PRESENTED.

There are four questions for consideration of this appeal.

A. Will a personal action lie for the collection of either real or personal property taxes levied pursuant to Chapter 10, SLA 1949 (even if the act had not been repealed) ?

B. Did any of the taxes sought to be collected in this action survive the repeal of Chapter 10, SLA 1949 by Chapter 22, SLA 1953 ?

C. If any such taxes did survive the repeal, is there a remedy available for their collection ?

D. Did the trial Court err in rejecting the introduction into evidence of House Bill No. 3 (T 48, 55) ?

SUMMARY OF ARGUMENT.

A. Will a personal action lie for the collection of either real or personal property taxes levied pursuant to Chapter 10, SLA 1949, (even if the act had not been repealed) ?

It is settled law in Alaska and elsewhere that in the absence of statutory authority no personal action will lie for the recovery of taxes levied on real or personal property. The remedy provided by the taxing statute is exclusive. Chapter 10 SLA 1953, which levied the taxes here involved, does not authorize a personal action, but establishes a lien on the property and provides a method of foreclosure. This was the sole remedy available before repeal. Taxes are not debts and

no common law action in debt or assumpsit will lie for their recovery; nor will equity entertain a non-statutory action for their collection. In the Western states a tax against property can only be collected by an action in rem unless the statute specifically authorizes a suit in personam. The many cases cited by appellant in support of the opposite view all relied on statutory authority for personal recovery.

B. Did any of the Taxes Sought to Be Collected in This Action Survive the Repeal of Chapter 10, SLA 1949 by Chapter 22, SLA 1953?

The taxes sought to be collected by this action did not survive the repeal of the act under which they were levied. At common law the repeal of a statute extinguishes all liability under it unless kept alive by a specific saving clause. Alaska has a general saving statute but it is unlike the Federal saving statute. The act repealing the taxing act had a special savings proviso of its own which is in conflict with the general act. Being later in time and constituting the express will of the legislature the special savings proviso must prevail. The special savings proviso of *the repealing act* saves some taxes but not those sought to be recovered here. The legislature by the special savings proviso of *the repealing act*, having saved some taxes but not others, it must be assumed that they intended to save only those specified. *Expressio unius est exclusio alterius*. (The mention of one is the exclusion of another.) The title of *the repealing act* requires this construction. Other provisions of *the repealing act* also support this view.

C. If any Such Taxes Did Survive the Repeal, Is There a Remedy Available for Their Collection?

The question is moot because no taxes survived the repeal. Even so, the special remedy provided by the taxing act was not saved from repeal and fell with the act. No other remedy is available. Taxation is statutory. Liability to pay cannot be enforced unless so provided by statute. There is no statute available here.

D. Did the Trial Court Err in Rejecting the Introduction Into Evidence of House Bill No. 3 (T. 48, 55)?

The trial court did not err in refusing to receive a certified copy of House Bill No. 3 into evidence. It is not a part of the legislative record which courts may judicially notice when construing ambiguous statutes; nor is the statute under construction ambiguous. The court, however, did take judicial notice of the legislative journals which contain the title, amendments, votes and other pertinent information respecting H. B. No. 3. The court had before it all and more than offered by appellant.

Miscellaneous.

The taxes sought to be collected here are not delinquent taxes because they fell with the repeal. The statute under consideration is not a revenue measure but an act to repeal a revenue measure.

ARGUMENT.**INTRODUCTION.**

A wide disparity exists between the views of appellant and appellees respecting the legal issues and legal precedents which are relevant and decisive in this case.

Appellant's version of the controversy is set forth in its opening brief. Because of the disparity mentioned above appellees will present their own view of the cause and will not adopt or attempt to follow the outline or order of presentation used by appellant.

The Alaska Property Tax Act which was Chapter 10 SLA 1949 will be referred to in this brief as *Chapter 10*. Chapter 22 SLA 1953 which repealed *Chapter 10* will be referred to herein as *the repealing act*.

A. WILL A PERSONAL ACTION LIE FOR THE COLLECTION OF EITHER REAL OR PERSONAL PROPERTY TAXES LEVIED PURSUANT TO CHAPTER 10, SLA 1949 (EVEN IF THE ACT HAD NOT BEEN REPEALED)?

1. There Is No Statutory Liability.

Appellant's opening brief contains numerous statements to the effect that the owners of real and personal property in Alaska are personally liable for the taxes levied against such property pursuant to *Chapter 10*. It is stated that this personal liability is imposed directly by statute. We do not deny that such a statutory situation *could* exist. But we point with emphasis to the fact that it does not exist. There is no such statutory obligation as that repeatedly referred to by appellant.

Appellant makes sketchy reference to various provisions of *Chapter 10* which are said to indicate an intention to create a personal liability. A full reading of the act negatives such a construction.

All of the sections of the act referred to by appellant (sections 9, 12, 13, 14, 15, 17, 22, 25, 30 and 37) with the exception of section 37 apply to the procedure to be followed in assessing the property, completing the assessment roll, hearings before the Board of Assessment and Equalization, etc. Section 37 denounces false returns and records.

Sections 32, 33, 34 and 42 which fix the time and mode of payment, establish the lien and provide for its foreclosure, are not referred to by appellant in this respect. These plus the provisions levying the tax are determinative. They do not support appellant's contention. Section 34 provides that "The taxes assessed upon property * * * shall be a lien thereon, * * * and no sale * * * shall * * * affect the lien * * *." Nothing is said about extending the lien to other property of the owner, or making the owner or anyone else personally liable for the discharge of the lien.

The tax is imposed by section 3 which states "There is hereby levied, and there shall be assessed, collected and paid, a tax upon all real property and improvements and personal property in the Territory". Section 4 provides that the tax levied by section 3 upon property within the limits of a municipality "shall be assessed, collected and enforced in the manner prescribed by the property laws of the municipality * * *".

These sections levy the tax on the property and not on the owner. They can be read in no other way. Furthermore, the title to the act is conclusive on the question. It reads "An Act levying a tax on property in Alaska; providing for collection thereof, and allowing certain exemptions; defining offenses and prescribing penalties; and declaring an emergency." See Chapter 10 SLA 1949. (The title does not appear in *the repealing act* as reproduced in Appendix "A" of appellant's opening brief.) The words of the title and of sections 3 and 4 mean what they say. The tax is on the property only—and only the property is liable.

Section 42 which creates the remedy for collection is equally plain. The remedy is by lien foreclosure. The lien is on the property—not on the owner. The pertinent language of the section provides that "The Tax Commissioner may, with the assistance of the Attorney General * * * proceed to foreclosure of said liens". No suggestion of personal liability or deficiency judgment is found in the section.

2. The Rule in Alaska.

It is settled law in the Territory of Alaska that in the absence of authority conferred by the taxing act no personal action can be maintained for the collection of a tax assessed against real or personal property. Only the property is liable. The collection remedy provided by the taxing statute is exclusive. The rule was stated by the late Judge Folta in *City of Yakutat v. Libby, McNeill & Libby*, 13 Alaska 378, 381, 98 F. Supp. 1011 as follows:

“The rule that in the absence of statutory provision, a personal action lies for the enforcement of the collection of a tax appears to be limited to taxes assessed against individuals. 1 Cooley on Taxation, 3rd Ed. 17. Nothing contrary to this limitation appears in the cases cited in support of the only statements of the rule discovered at 61 C.J. 1052, Sec. 1377, Note 85; 51 Am. Jur., Sec. 984, Note 13; and *Marion County v. Woodburn Mercantile Co.*, 60 Or. 367, 119 P. 487, 41 LRA NS 734.”

No appeal was taken in *City of Yakutat v. Libby*, *supra*, but in a later case arising out of efforts of the City of Yakutat to collect the same tax, the record in the earlier proceeding was made a part of the record on appeal by stipulation. Consequently this court had the whole record before it when the later case of *Libby, McNeill & Libby v. Yakutat*, 14 Alaska 367, 206 F. 2d 612, was heard and decided.

The decision by this court in *Libby, McNeill & Libby v. Yakutat*, *supra*, impliedly recognizes the correctness of Judge Folta's holding in the earlier case. It is inconsistent with any other view. The decision points out that:

“The court's power to order property sold for taxes has its sole and only source in the statute.”

A similar statutory authority would have been required had the action been in personam. It was a previous action in personam which Judge Folta dismissed. The city then attempted to avail itself of an existing statutory remedy by way of lien foreclosure.

Marion County v. Woodburn Mercantile Co., *supra*, cited by Judge Folta, contains a complete discussion of the question and is considered a leading case on the subject. As reported in 41 LRA NS 734, it contains an exhaustive footnote analyzing all the state and federal decisions on the subject as of that date.

3. The Rule in Other Circuits.

The rule denying an equitable action for recovery in the absence of statute was announced as a fundamental principle of law by the Sixth Circuit Court of Appeals, in *Preston v. Sturgis Milling Co.* (1910) 183 F. 1, and personal liability was denied for lack of legislative authority by the Eighth Circuit Court of Appeals in *Helvering v. Johnson County Realty Company* (1922) 128 F. 2d 716. The *Helvering* decision follows the rule in Iowa where the case arose. The rule in Iowa was restated in *Re Estate of John C. McMahon* (1946) 21 N.W. 2d 581, 163 ALR 720. For the rule in Nebraska see *Midland Guaranty & Trust Co. v. Douglas County* (8th Circuit) 217 F. 358.

4. The Text Writers.

In *Cooley on Taxation*, 4th Ed. Vol. 3, p. 2630, Section 1330, the rule is stated as follows:

“However, in most jurisdictions it is held that statutory remedies for the collection of delinquent taxes are exclusive and preclude the maintenance of an action at law, i. e. that when the statute undertakes to provide remedies, and those given do not embrace an action at law, a common-law action for the recovery of the tax as a debt will not lie.” Cases are cited from Georgia, Iowa,

Kansas, Kentucky, Missouri, Nebraska, New Jersey, Oregon, South Dakota, Utah, Virginia and West Virginia.

Contrary decisions for the most part, are based on the premise that taxes are a debt and that assumption will lie. But the Supreme Court of the United States has repeatedly held that a tax levied on property is not a debt.

5. Taxes Are Not Debts.

A full discussion of this point is found in *Meriwether v. Garrett*, 102 U.S. 472 at pages 513 and 514, where the court among other things said:

“Taxes are not debts. It was so held by this court in the case of *Oregon v. Lane County*, reported in 7th Wallace. Debts are obligations for the payment of money founded upon contract, express or implied. Taxes are imposts levied for the support of the government, or for some special purpose authorized by it. The consent of the taxpayer is not necessary to their enforcement. They operate *in invitum*. Nor is their nature affected by the fact that in some states, and we believe in Tennessee, an action of debt may be instituted for their recovery. The form of procedure cannot change their character.”

See also:

Florida C. & P. R. Co. v. Reynolds, 183 U.S. 471, 22 S. Ct. 176, 46 L. ed. 283.

The same rule was laid down long ago by the District Court of Alaska. See *In Re Street Assessments in the Town of Seward* (1917) 5 Alaska Reports 726,

where Judge Brown quoted from 37 Cyc., p. 710 with approval as follows:

“As the obligation to pay taxes does not rest upon any contract express or implied, or upon the consent of the taxpayer, a tax is not a debt in the ordinary sense of that word; and for the same reason taxes are not assignable as ordinary debts, unless it is expressly so provided, nor are they the subject of set-off between the taxpayer and the state or municipality.”

A different rule has sometimes been applied where the tax sought to be collected is a license or income tax imposed directly on the person as a privilege of doing business or a stamp tax imposed as a necessary incident to a transaction. *Milwaukee County v. M. E. White Co.* 296 U.S. 268, 271, 56 S. Ct. 229, 80 L. ed. 220, 224 and *United States v. Chamberlin*, 219 U.S. 250, 31 S. Ct. 204, 55 L. ed. 204, both cited in appellant's opening brief are such cases. In those cases the tax was not a levy on real or personal property.

6. The Action Is In Rem—Not In Personam.

In the Western states the courts have uniformly held that a tax levied against property either real or personal cannot be collected by a proceeding in personam unless specifically authorized by the statute. Otherwise the proceeding must be in rem against the property.

The Supreme Court of Montana said:

“Every piece of real estate is liable for the taxes upon it, and the owner thereof is not personally liable therefor.” *Calkins v. Smith* (1938) 78 P. 2d 74, 76.

In Oklahoma the rule was stated in the Syllabus as follows:

“Taxes are not true ‘debts’ and no personal judgment may be obtained for taxes.” *Bell v. Trosper*, 77 P. 2d 544.

See also

McDonald v. Duckworth, 173 P. 2d 436.

The Supreme Court of California passed on the question in 1951 in *Helvey v. Sax*, 229 P. 2d 796. Section 5 of the Syllabus in this case reads as follows:

“Where a public agency with taxing powers charges a tax upon land, no resort can be had against the owner or his personal estate, because the tax levied is in rem and not in personam.”

The same controversy was again heard on appeal and the court again said:

“A property tax operates in rem against the property.” *Helvey v. Sax*, 237 P. 2d 269, 271.

The Supreme Court of Washington applied the rule with equal force to personal property in *Puget Sound Power & Light Co. v. Cowlitz County*, 234 P. 2d 506, 512, when the court stated:

“However, we are satisfied that this court never intended to intimate that the owner of personal property was personally liable for the taxes levied thereon. In the absence of statutory authority he is not subject to suit by the county to compel payment.”

The Supreme Court of Oregon in 1943 stated the rule as applicable to both real and personal property in these words:

“An assessment for tax purposes does not create a personal debt except as declared by statute. *Marion County v. Woodburn Mercantile Co.*, 60 Or. 367, 119 P. 487, 41 LRA NS 730.” *City of Salem v. Marion County*, 137 P. 2d 977, 985.

The Arizona Supreme Court in *Santos v. Simon*, 138 P. 2d 896, speaking in 1943 said:

“That is the point. The owner does not owe the tax levied against his property. The whole proceeding to collect taxes is in rem”.

For the rule in Kansas see *Board of Commissioners of Sherman County, Kansas v. Alden* (1944) 158 Kansas 487, 148 P. 2d 509.

We have examined all of the above cases carefully, together with the authorities cited therein. We can find no instance where the decision turned on any statutory language denying personal liability. The absence of a specific provision granting a right of action against the owner is the test. Because that was lacking, no personal action was permitted in these cases. Chapter 10, which is under consideration in this case, does not purport to grant a personal action. The simplest reading of the act serves to disprove the statement on page 18 of appellant's opening brief that: “The Alaska Property Tax Act specifically imposes a personal obligation on the ‘taxpayer’ who is ‘assessed and taxed’ ”. On page 24 of his opening brief the Attorney General concedes that: “Admittedly, the Alaska Property Tax Act does not provide for (1) a specific remedy for the collection of taxes against the person,”.

7. Appellant's Authorities.

The proposition is conclusive. Notwithstanding this fact, the Attorney General on page 22 of his opening brief states that, "Even under statutes imposing the tax solely *on the property*, the owner thereof has been held personally liable".

He cites some thirteen state decisions and one federal decision purportedly supporting his position. A careful reading of all of the state decisions and of the authorities cited in them, discloses that in each case some provision of the state statute was relied upon as the basis of personal liability. Two of the cases were decided in Tennessee where, as the Supreme Court points out in *Meriwether v. Garrett, supra*, an action in debt may be instituted for the recovery of taxes. The federal decision is *North Uumberland County v. Philadelphia and Reading Coal and Iron Co.*, 131 F. 2d 562 decided by the Third Circuit Court of Appeals in 1942. It involves efforts to compel a trustee in bankruptcy to pay local real estate taxes on lands of the debtor from funds in his possession. The case turns on the highly interesting and historical practice based on early colonial enactments and customs whereby real property taxes in Pennsylvania are collected from the occupant of "seated" (occupied) lands and by sheriff's sales of "unseated" (unoccupied) lands. It gives no comfort to the position of the Attorney General in this case. Two of the thirteen decisions also turn on Pennsylvania law.

B. DID ANY OF THE TAXES SOUGHT TO BE COLLECTED IN THIS ACTION SURVIVE THE REPEAL OF CHAPTER 10, SLA 1949 BY CHAPTER 22, SLA 1953?

1. Common Law.

The answer is no. Under the common law the repeal of a statute extinguished all penalties and liabilities created by the statute and unpaid on the date of the repeal unless the same were kept alive by a specific savings clause. The rule applies to repealed tax statutes. 50 *Am. Jur.* p. 532, § 524, Statutes; 51 *Am., Jur.* p. 353 § 300, Taxation; *Flanigan v. County of Sierra*, 196 U.S. 553, 25 S. Ct. 314, 49 L. ed. 597; *Ex parte McCardle*, 74 U.S. 506, 19 L. ed. 264; *Norris v. Crocker*, 54 U.S. 429, 14 L. ed. 210. There is no authority to the contrary. Appellant makes no such assertion.

2. General Savings Act.

Many jurisdictions, including the United States, (Secs. 29 and 109, Title 1, U.S.C.A.) have enacted general savings statutes amendatory to the common law and designed to save rights and remedies accrued under repealed statutes prior to the date of repeal. The United States General Savings Statute was construed and applied by this court in *U. S. v. McNair*, 180 F. 2d 273. General savings statutes are derogatory of the common law and are strictly construed by the courts particularly where penalty or forfeiture is involved. *U. S. v. Auerbach*, 68 F. Supp. 776 (D.C. Cal. 1946); *U. S. v. Hark* (D.C. Mass. 1943), 49 F. Supp. 95. The cases are clear on the proposition that in the absence of a savings statute all penalties, forfeitures,

and liabilities are lost. In *Hertz v. Woodman*, 218 U.S. 205, 54 L. ed. 1001, 30 S. Ct. 621, the Supreme Court said:

“an unqualified repeal operates to destroy inchoate rights, as a release of imperfect obligations, and as a remission of penalties and forfeitures dependent upon the destroyed statute.”

3. In Alaska.

Alaska has a general savings statute. The original general savings act was previously found in Chapter 7 of the Session Laws of 1929 and was identical in effect with the federal act previously mentioned. In 1947 the Territorial Legislature enacted a new savings statute designated as Chapter 18 of the Session Laws of 1947. It is entirely different from the previous one. The new act was carried into the 1949 codification as Section 19-1-1, A.C.L.A. 1949. It was re-enacted without change material here by Chapter 4, Extraordinary Session Laws of 1955.

4. Statutory Situation in Alaska.

The statutory situation in Alaska is as follows:

(1) The taxes sought to be collected were levied pursuant to the Alaska Property Tax Act, Chapter 10 SLA herein referred to as *Chapter 10*, which was repealed by Chapter 22, SLA 1953, herein referred to as *the repealing act*.

(2) The original Alaska General Savings Statute of 1929—Chapter 7, *Laws of 1929*, Sec. 1:

“The repeal or amendment of any statute shall not have the effect to release or extinguish any

penalty, forfeiture or liability incurred in a civil action under such statute unless the repealing Act shall so expressly provide, and such statute shall be treated as still remaining in force for the purpose of sustaining any proper action or prosecution for the enforcement of such penalty, forfeiture or liability."

identical in effect with the Federal General Savings Statute—Sections 29 and 109, Title 1, *U.S.C.A.*

"Repeal of statutes as affecting existing liabilities. The repeal of any statute shall not have the effect to release or extinguish any penalty, forfeiture, or liability incurred under such statute, unless the repealing Act shall so expressly provide, and such statute shall be treated as still remaining in force for the purpose of sustaining any proper action or prosecution for the enforcement of such penalty, forfeiture, or liability."

was superseded by the limited, obscurely worded Alaska General Savings Statute of 1947—Section 19-1-1, *A.C.L.A.*

"Effect of repeals or amendments. The repeal or amendment of any statute shall not affect any offense committed or any act done or right accruing or accrued or any action or proceeding had or commenced prior to such repeal or amendment; nor shall any penalty, forfeiture or liability incurred under such statute be released or extinguished, but the same may be enforced, continued, sustained, prosecuted and punished under the repealing or amendatory statute save as limited by the ex post facto and other provisions of the Constitution, in which event the same may be enforced, continued, sustained, prosecuted and

punished under the former law as if such repeal or amendment had not been made.”

(3) The act of 1953 herein called *the repealing act* contains a specific but limited savings proviso—Section 2(a) Chapter 22 *Laws of 1953*—

“Section 1 of this Act shall not be applicable to:
(a) any taxes which have been levied and assessed by any municipality, school or public utility district under the provisions of Chapter 10, Session Laws of Alaska 1949, as amended, or which are levied and assessed during the current fiscal year of such municipality, school or public utility district;”

(4) The two Alaska General Savings Statutes and the savings proviso of *the repealing act* all deal with the same subject and all are in conflict with each of the others.

5. The Alaska General Savings Statute.

The first sentence of the current *Alaska General Savings Act*, *supra*, is restated here:

“The repeal or amendment of any statute shall not effect any offense committed or any act done or right accruing or accrued or any action or proceeding had or commenced prior to such repeal or amendment.”

If this were the only statutory pronouncement on the subject it might be argued that accrued taxes survived the repeal of *Chapter 10*. But this is not the only statutory language applicable. *The repealing act*, *supra*, contained a savings proviso of its own which is

clearly in conflict with the general savings act above quoted.

6. The Proviso of the Repealing Act Overrides the General Savings Statute.

The later, more limited savings proviso of *the repealing act*, being more nearly in conformity with the common law, being later in time than the earlier general savings statute, and constituting the express will of the legislature with respect to taxes to be saved by the repeal of *Chapter 10*, must prevail. Sec. 50 *Am. Jur.* p. 534, Statutes, § 528; 82 *C.J.S.* 1015, Statutes, § 440; *Wilmington Trust Co. v. U. S.* (D.C. Del.), 28 F. 2d 205.

In *Wilmington Trust Co. v. U. S.*, *supra*, the court said at p. 208:

“As the estate tax provisions * * * were expressly repealed, with specified exceptions, it must be assumed that the exceptions specified constituted a denial of others.”

The Attorney General criticizes *Wilmington Trust Company v. U. S.*, *supra*, and cites five cases which are alleged to depart from or overrule the holding in that case.

A very careful reading of these five decisions discloses that the criticism of the *Wilmington* case in all of them is directed toward the court's construction of a provision of the Internal Revenue Act. No criticism or adverse comment is found in any of these cases touching on the application of the savings statute or savings proviso. The Attorney General offered

similar criticisms of the *Wilmington* decision in his brief below. They are commented upon in Judge Hodge's opinion (R. 61).

50 *Am. Jur.* Sec. 528 states the rule as follows: "Where the savings clause refers to a specific matter, it has been taken as an indication of a legislative intent to save nothing else from the repeal."

In California the rule has been twice applied in cases where amendments to the state constitution dealing with specific subjects were at variance with earlier general provisions of the constitution.

"As Section 22 of Article 20 was adopted last, as it is special in dealing with this subject * * * its provisions must be held to control".

Los Angeles Brewing Company v. City of Los Angeles, (Cal. 1935), 48 P. 2d 71, 74.

"Being special in nature and adopted later, the constitutional provision * * * must be held to control in the express field that it covers."

Ainsworth v. Bryant, (Cal. 1949), 211 P. 2d 564, 568.

7. **Expressio Unius Est Exclusio Alterius.**

Furthermore, the rule of statutory construction, *expressio unius est exclusio alterius* (the mention of one is the exclusion of another), requires a holding that the legislature intended to save the taxes specifically mentioned in *the repealing act* and to exclude all others. The rule is stated clearly in *Sutherland on Statutory Construction*, 3rd Ed. Vol. 2, p. 412, Sec.

4915, and again at p. 416, Sec. 4916, where the author says that the rule has received endorsement in the application of statutes on revenue. The Fourth Circuit Court applied the rule in 1932 in *Jones v. Crosswell, Inc.*, 60 F. 2d 827, where it said on page 828, "It is a well settled principle of statutory construction that the expression of one thing excludes others not expressed.", and again in *Rybolt v. Jarrett*, 112 F. 2d 642, 645. The Alaska District Court in *Territory ex rel Sulzer v. Canvassing Board*, 5 Alaska 602, 622 said the rule was a canon of construction known to all lawyers.

The rule was applied by the Supreme Court without use of the expression in *Townsend v. Little*, 109 U.S. 504, 27 L.ed. 1012, 3 S.Ct. 357, where it was said at page 512 of the decision as reported in 109 U.S.:

"According to the well settled rule, that general and specific provisions, in apparent contradiction, whether in the same or different statutes and without regard to priority of enactment, may subsist together, the specific qualifying and supplying exceptions to the general, this provision for the execution of a particular class of deeds is not controlled by the law of the territory requiring deeds generally to be executed with two witnesses."

Nor do we contend, as inferred on page 59, footnote 10, of appellant's brief, that the maximum is substantive law or that it can be used to override clear and contrary evidence of legislative intent. We agree with the statement of counsel for the Territory that the rule is

only an aid in ascertaining legislative intent and may not be employed to defeat such intent. Nor are we attempting to so apply it. We are somewhat puzzled over the citation of three Alaska cases in this portion of the Territory's brief. We refer to the cases of *U. S. v. Hardcastle*, 10 Alaska 254; *Anderson v. Smith*, 8 Alaska 470, and *Freeman v. Smith*, 8 Alaska 229. No rule of statutory construction helpful to the Territory is enunciated in these cases.

The proposition is stated as follows in American Jurisprudence and Corpus Juris Secundum:

50 *Am. Jur.* 535 Statutes, Sec. 528. Express savings provisions in repealing statutes.

"§ 528. *Express Savings Provisions in Repealing Statutes.* Frequently, there are express savings clauses in repealing statutes, which continue the law in force as to all cases to which they apply. Sometimes, such a savings provision does not extend to matters other than suits and processes pending at the time. Where the savings clause refers to a specific matter, *it has been taken as an indication of a legislative intent to save nothing else from the repeal.* In this respect, it has been held that, *where a repealing statute contains a special savings clause, a general saving statute in force in the state does not apply, and no rights or remedies are saved, except such as are saved by the special saving clause.*" (Emphasis supplied.)

82 *C.J.S.* 1015 Statutes, Sec. 440, Saving Clauses.

"General saving clauses are not to be regarded as attempts on the part of the legislatures enact-

ing them to curtail the authority of succeeding legislatures by limiting in advance the effect to be given their enactments. *They are themselves subject to either express or implied repeal by subsequent acts, and cannot operate to save provisions of repealed statutes contrary to the clear language of the repealing act. In some jurisdictions they have been held not to apply to repealing statutes having a specific saving clause. * * ** (Emphasis supplied.)

Therefore, since the 1953 Territorial Legislature expressly saved

“(a) any taxes which have been levied and assessed by any municipality, school or public utility district under the provisions of Chapter 10, Session Laws of Alaska, 1949, as amended, or which are levied and assessed during the current fiscal year of such municipality, school or public utility district”,

it would follow that the general saving statute would have no application in this case and that the later specific saving clause overrides the earlier general savings statute.

8. State v. Showers.

The rule established long ago in the Kansas case of *State v. Showers*, (Kan. 1885), 8 P. 474, still prevails and has been iterated and reiterated by many courts since. In that case the Supreme Court of Kansas was considering the effect of a general savings statute as against a later specific savings proviso contained in the repealing act.

State v. Showers, 8 P. 474, at pages 476, and 477:

“The question as to what should be repealed and what saved was before the legislature. They had the entire subject-matter thereof under consideration, and evidently intended to cover the entire ground; and evidently intended that nothing should be repealed except what they expressly repealed, and that nothing should be saved except what they expressly stated should be saved. They expressly saved some things; therefore it must be inferred that they intended to save no others. *Expressio unius est exclusio alterius*. The legislature evidently intended that the special saving cause which they enacted in section 19 of the Act of 1885 should take the place of all others, so far as prosecutions under original section 7 were concerned; and *that in cases where the special saving clause could apply the general saving statute should have no operation*. ‘It is a well-settled rule of construction that specific provisions relating to a particular subject must govern in respect to that subject, as against general provisions in other parts of the law which might otherwise be broad enough to include it.’ *Felt v. Felt*, 19 Wis. 196.” (Emphasis supplied.)

* * * * *

“If, however, the saving clause in section 19 of the act of 1885 was not intended by the legislature to cover the entire ground, and to be a substitute for the general saving statute so far as cases like this are concerned, then the saving clause contained in section 19 of the Act of 1885 has no office to perform, but is absolutely worthless, for the general saving clause would save all that it saves and very much more. Such an interpretation of

the law as this would violate all proper canons of construction. It would in effect say that the legislature had done the very foolish thing of enacting a saving clause which can have no real operation at all, and can subserve no actual purpose whatever. 'It is a well-settled rule that when any statute is revised, or one act framed from another, some parts being omitted, the parts omitted are not to be revived by construction, but are to be considered as annulled. To hold otherwise would be to impute to the legislature gross carelessness or ignorance, which is altogether inadmissible.' *Ellis v. Paige*, 18 Mass. 45."

The general savings statute of Kansas at that time read as follows:

"* * * nor does such repeal affect any right which accrued, any duty imposed, any penalty incurred, nor any proceeding commenced under or by virtue of the statute repealed."

It was identical in effect with the Alaska General Savings Act of 1947, set forth on page 18 *supra*.

The special saving proviso in the statute before the Kansas court stated:

"All prosecutions pending at the time of the taking affect of this act shall be continued the same as if this act had not been passed."

(The savings proviso was preceded by language affecting an outright repeal.)

The question involved was whether prosecutions could be commenced after repeal for offenses committed before repeal. The court held that they could not because only pending prosecutions were saved.

The *Showers* case has been distinguished but only by cases in which the General Saving Act in question contained wording similar to that found in the Federal Savings Statute. (“ . . . unless the repealing act shall so expressly provide, . . . ”)

See Federal Savings Statute, Secs. 29 and 109, Title 1, *U.S.C.A.* p. 18, *supra*.

See also:

Great Northern Ry. Co. v. U. S., (8th Cir. 1907), 155 F. 945;

U. S. v. Chicago, St. Paul, Minneapolis & Omaha Railway, (D.C. Minn. 1907), 151 F. 84;

U. S. v. Standard Oil Co., (D.C. Ill. 1907), 148 F. 719.

State v. Showers was quoted in the three cases just cited. In those cases, the general savings statute under consideration was the federal act, previously quoted on page 18 hereof. This previously quoted statute provides that no liability shall be released or extinguished by repeal “unless the repealing act shall so expressly provide”. The decisions in those cases point out the contrasting language of the Federal and Kansas General Savings Statutes. The same contrast exists here between the Federal and Territorial General Savings Statutes. See also *U. S. v. Chicago, St. Paul, Minneapolis & Omaha Railway* (D.C. Minn. 1907), 151 F. 84. In that case, the court after quoting both the Federal statute and the Kansas statute said on page 90 of the decision:

“It will be noted that the words of the Kansas statutes above quoted are far from identical with those of the federal statutes now being considered. The Kansas statute of construction contains the words ‘unless such construction would be inconsistent with the manifest intent of the Legislature, or repugnant to the context of the statute’, and thus leaves open to the courts the application of the recognized canons of construction to ascertain from the language of the repealing statute and the context of the statute the intent of the Legislature. There are no such words in section 13, and the Kansas statute does not provide, as does section 13, that the repeal of any statute shall not have the effect to release or extinguish any penalty, forfeiture, or liability under the repealed statute, unless the repealing act shall so expressly provide. Under the Kansas statute it was not necessary to expressly provide in the repealing act that a certain class of offenders shall be released from prosecutions, but under the federal statute it is imperative that there should be such an express provision. The words ‘unless the repealing act shall so expressly provide’ differentiates the two statutes, and in my opinion make the Kansas case of little, if any, value in determining the question now under consideration.”

It will be noted that the Kansas case and the three federal cases immediately above cited all deal with attempted criminal prosecutions. But they each turn on a general savings statute applicable alike to civil and criminal actions. The statute being construed is not a criminal statute but a general savings statute, alleged to have been overridden by a later special sav-

ings proviso. The General Savings Statute reads the same whether applied to a civil or criminal action. It must be construed the same. The same words in the same statute must have the same meaning. This court held Secs. 29 and 109, Title 1, *U.S.C.A.* quoted on page 18, *supra*, to have equal application to civil liabilities. *U. S. v. McNair, supra*. Such has been the uniform interpretation since *Hertz v. Woodman, supra*.

The Alaska General Savings Statute is identical in effect with the then Kansas Act. It was made so deliberately by the Alaska Legislature in 1947. Prior to 1947 the Alaska Act was identical in effect with the present federal act. The legislature changed the rule and adopted a statute paralleling the Kansas Act. The federal parallel was abandoned.

See also *Friend v. Levy*, 80 N.E. 1036, decided by the Supreme Court of Ohio and *Meriwether v. Garrett*, 102 U.S. 472, 26 L.ed. 197.

9. The Title as an Aid to Construction.

The construction suggested above becomes conclusive from examination of the title of *the repealing act*, which reads as follows:

“To repeal the Alaska Property Tax Act enacted by Chapter 10, Session Laws of Alaska, 1949, as amended by Chapter 88, Session Laws of Alaska, 1949; *excepting from repeal certain taxes and tax exemptions*; and declaring an emergency.” Ch. 22, SLA 1953. (*Italics supplied.*)

Different courts have given various weights to the wording of the title of acts as an aid to construction.

Courts in those jurisdictions where, like in Alaska, the constitution or organic act (See Alaska Organic Act, Sec. 8) requires the purpose of the act to be stated in its title have always given greater consideration to the title as an aid in construction. See 50 *Am. Jur.* p. 302, Statutes, Sec. 313. See also *Sutherland on Statutory Construction*, Third Edition, Vol. 2, p. 344, Sec. 4802.

In 1910, the Ninth Circuit Court of Appeals in *Sesnon Co. v. U. S.*, 3 Alaska F. 538, 182 F. 573, which arose in Alaska and involved an act of Congress, stated at page 576 of the decision as reported in 182 F.

“Where doubt exists as to the meaning of the statute, the title may be looked to for aid in its construction”

The language above was quoted with approval by Judge Murane in *U. S. v. Jourden*, 4 Alaska 354, decided in the Second Division in 1911. If any doubt exists that the legislature saved and intended to save only the taxes levied or to be levied by a municipality, school or public utility district, such doubt is resolved by an examination of the title of the repealing act.

“To repeal the Alaska Property Tax Act * * * excepting from repeal certain taxes and tax exemptions; * * *.”

10. No Taxes Survived.

It is clear then that the Alaska General Savings Act being in conflict with the special saving clause of *the repealing act* has no application and saved no taxes.

It is equally clear that Section 2(a), the special savings proviso of *the repealing act*, saved only the taxes levied or about to be levied by municipalities, school or public utility districts. Those were the taxes and the only taxes saved or which survived the repeal. They are not involved in this litigation.

The argument advanced by appellant to the effect that the purpose of the special savings clause in *the repealing act* was to grant something additional in the way of taxing power to municipalities, school and public utility districts and save something for these political entities that would not otherwise be saved by the General Alaska Saving Statute, falls of its own weight. Section 2(a) covers two situations which may be read separately as follows:

(1) Sec. 1 of this act shall not be applicable to "any taxes which have been levied and assessed by any municipality, school, or public utility district under the provisions of Chapter 10, Session Laws of Alaska 1949, as amended,"

and,

(2) Sec. 1 of this act shall not be applicable to any taxes "which are levied and assessed during the current fiscal year of such municipality, school or public utility district."

The purpose of situation (1) is obvious. It was to save the taxes levied by municipalities, school districts and public utility districts which had been levied pursuant to *Chapter 10* since its enactment in 1949 and which had not been paid. The remedial provisions of Chapter 10 were not saved by this provisio

or by the Alaska General Savings Statute. The legislature knew that was not necessary because a remedy is provided by other provisions of the Alaska Statutes. See Sec. 16-1-11 et seq.; 37-3-54, and 49-2-29; ACLA 1949.

Situation (2) has the effect and the sole effect of delaying the effective date of the repeal as to taxes levied by municipalities, etc. during their current fiscal year. This is approximately the same result as to municipalities, etc. sought by certain members of the legislature when they tried to strike the emergency clause and make the repeal effective January 1, 1954. (P. 38 App. "G" appellant's opening brief.) That date would in most cases have covered "the current fiscal year". Municipalities determine their own fiscal year for tax purposes (16-1-112 A.C.L.A. 1949) and the legislature could hardly know the exact dates established by the various municipalities.

What the legislature did know, as to both situations, was that many of the municipalities, school districts and public utility districts relied heavily, for both current and past years, on the taxes levied under *Chapter 10. Hess v. Mullaney*, 213 F. 2d 635, 642.

In the case of school districts this comprised all, or most all of their total levy. The procedure for collection of delinquent taxes, including the portion thereof levied by the Alaska property tax law, accruing to municipalities and school districts is by filing delinquent tax rolls in the office of the Clerk of the District Court, publishing a list of the taxes with notice of delinquency, and petitioning the court for

an order of sale. See *Libby, McNeill & Libby v. City of Yakutat*, *supra*.

There is no statutory requirement that this be done every year. No doubt this court, from the municipal tax cases which have come to it from Alaska, is familiar with the general practice in municipalities and school districts of allowing several years' delinquent taxes to accrue and then bringing one roll before the court for all the years, with one petition for order of sale. In one case appealed to this court, *Town of Skagway v. Pacific and Arctic R. R. Co.*, No. 14215 (1954), the city had included twelve years' taxes in one proceeding (see R. p. 3 of that case).

Therefore what the legislature saved by section 2 of *the repealing act* was these accumulated unpaid taxes of municipalities and school districts, and the taxes levied or in the process of levy by them for the current year. This is readily understandable, for none of them had levied a separate municipal or school district tax completely apart from the ten mill tax levied by *Chapter 10*. (*Hess v. Mullaney*, *supra*.) The local levy made by the municipalities and school districts was superimposed on the ten mills levied by *Chapter 10*. The total levy was from twelve to twenty mills. *Chapter 10* taxes constituted the bulk of the levy and unless saved from repeal the taxpayer would likely deduct them from his tax statement and bankrupt the municipality or school district.

The taxes levied by *Chapter 10* on property outside municipalities and school and public districts, less than one-third of the total amount levied within the

local taxing units (*Hess v. Mullaney*, 213 F. 2d 635, 639), were in a different category. They were levied and collected by territorial officials for territorial purposes. The Territorial Legislature could deal with these with a free hand and without fear of disturbing the financial structure of municipalities, school districts and public utility districts.

11. Section 2(b) of the Repealing Act.

Section 2 of Chapter 22 SLA reads as follows:

“Section 1 of this Act shall not be applicable to:

- (a) any taxes which have been levied and assessed by any municipality, school or public utility district under the provisions of Chapter 10, Session Laws of Alaska 1949, as amended, or which are levied and assessed during the current fiscal year of such municipality, school or public utility district; and
- (b) *any exemptions from the taxes referred to in subsection (a) of this section, which have been granted under the provisions of Section 6(h) of Chapter 10, Session Laws of Alaska 1949.*” (Emphasis supplied.)

What was the purpose of Section 2(b) italicized above? It was to insure that exemptions granted by the Tax Commissioner under the industrial incentive clause of *Chapter 10* (Section 6(h), Chapter 10) would continue in effect as to taxes previously levied, or to be levied, during the current year by municipalities, school and public utility districts. Section 2(b) made no effort to save such exemptions as to taxes

levied outside municipalities, etc. The legislature clearly thought that unnecessary. Why? Because taxes outside municipalities were not intended to survive the repeal. No exemption was necessary since there were no taxes outside of municipalities, etc. against which the exemption could apply.

Does the Attorney General contend that the legislature intended to save the taxes levied prior to repeal on property outside municipalities, etc., but to repeal and remove the exemptions granted under the industrial incentive clause as to such property and at the same time continue such exemption as to property within the municipalities, etc. Such a distorted interpretation is clearly untenable. The legislature was more consistent. It preserved the exemption as to the taxes saved—"the taxes referred to in subsection (a) of this section".

C. IF ANY SUCH TAXES DID SURVIVE THE REPEAL, IS THERE A REMEDY AVAILABLE FOR THEIR COLLECTION?

From what has been said before the proposition is moot. Since the taxes did not survive the repeal the question of whether or not a remedy for their collection exists is academic. However, for the purpose of argument, and only for that purpose, we will discuss the existence or non-existence of a remedy for the collection of any taxes levied outside the boundaries of municipalities, public utility districts or school districts, which might have survived the repeal of *Chapter 10*.

1. Chapter 10.

It requires no argument to establish the proposition that when *Chapter 10* was repealed the special remedies provided by it for the collection of taxes levied under it, ceased to exist as of the effective date of the repeal unless saved by (1) General Alaska Savings Act, or; (2) the special savings proviso of *the repealing act*.

2. The Alaska General Savings Act.

We will first consider what if anything was saved by way of remedy under the terms of the Alaska General Savings Act. The language of the Alaska General Savings Act dealing with remedial matters is as follows:

“* * * nor shall any penalty, forfeiture or liability incurred under such statute be released or extinguished, but the same may be *enforced, continued, sustained, prosecuted and punished under the repealing or amendatory statute* save as limited by the ex post facto and other provisions of the Constitution, in which event the same may be enforced, continued, sustained, prosecuted and punished under the former law as if such repeal or amendment had not been made * * *” (Emphasis supplied.)

Search for a remedy here is futile. The act provides the following methods of enforcing such taxes and penalties as might have been saved:

- (a) under the repealing * * * statute; or
- (b) if the repeal * * * statute be limited by the ex post facto and other provisions of the con-

stitution, then enforcement shall be “under the former law as if such repeal * * * had not been made”.

The term “ex post facto” refers only to criminal matters. No limitation by “other provisions of the Constitution” can be visualized, consequently enforcement cannot be had “under former law” as if such repeal * * * had not been made”.

Even the stronger and more emphatic Federal General Savings Statute found in Sections 29 and 109, Title 1 *U.S.C.A.*, quoted on page 18 *supra*, will not operate to save the special remedies of a repealed statute. This was indicated by the Supreme Court in the recent case of *Bridges v. United States*, 346 U. S. 209, 97 L. ed. 1557, 73 S. Ct. 1055, when the court on page 227 of the decision as reported in 346 U. S. quoted the federal statute in a footnote preceded by the following statement:

“See also, the general saving clause that was in the revised statutes but has been regarded as not applicable to matters of remedy and procedure.”

See also *U. S. v. Obermier*, 186 F. 2d 243, 253, where the Second Circuit Court of Appeals held that the Federal Savings Statute does not save remedies.

The net result is that the territory is relegated to remedies “under the repealing * * * statute”. *The repealing act* contains no remedial provisions and saves no remedies of any kind and did not intend to. It did not even save remedies for the collection of the taxes saved. The legislature knew that was not

necessary because as previously stated other provisions of the Alaska Code provided a remedy for the enforcement and collection of taxes levied and assessed by a municipality, school, or public utility district. See Sec. 16-1-111 et seq.; 37-3-54, and 49-2-29; ACLA 1949.

3. Remedy Under the Savings Proviso.

As above stated the savings proviso of *the repealing act* of 1953 saved no remedies and did not pretend to.

4. No Remedy Exists.

Taxes together with actions for their enforcement and collection are the creatures of statute. Just as no personal action will lie for their collection in the absence of a personal liability founded on statute so also it is true that no action in rem by way of delinquent tax roll proceedings, statutory lien foreclosures, etc. can be maintained unless the same is founded on statute.

“All taxation is statutory, and, while it is the duty of every citizen to bear his just proportion of the burden of supporting national, state and local government, he cannot be compelled to do so except in a way provided by a statute. Liability to pay taxes arises from no contractual relation between the taxable and the taxing power, and cannot be enforced by common law proceedings unless a statute so provides. They can be collected in no other way than that pointed out by the statute.”

Schmuck v. Hartman, 222 Pa. 190, 195, 70 Atlantic 1091, 1092.

Prior to the repeal of *Chapter 10*, only one kind of action was available to the Territory to enforce collection of taxes levied outside of municipality, school and public utility districts. That action was by way of delinquent tax roll procedure provided for in Section 42 of *Chapter 10*. No personal action could have been maintained then and no personal action can be maintained now. The delinquent tax roll procedure provided for by Section 42 of *Chapter 10* and available to the Territory prior to its repeal, fell with the repeal. It was not saved by (1) the Alaska General Savings Statute, or (2) the special savings proviso of *the repealing act*. Neither of these savings provisions pretended to authorize the continued use of the remedial provisions of *Chapter 10* after its repeal. It was the exclusive remedy and it was lost by the repeal.

“§ 529. *Pre-existing Remedies as Affected by Repeal.* It is firmly established that there is no vested right in any particular mode, procedure or remedy, and it is a general rule that, where a statute giving a particular remedy is unqualifiedly repealed, the remedy is gone. Indeed, where a statute giving a special remedy is repealed by a later act which substitutes nothing in its place, the effect is to obliterate such statute as completely as if it had never been passed, and any proceedings taken subsequent to the absolute repeal of the law to which they owe their existence are coram non judice and void.”

50 *Am. Jur.* pp. 535, 536, Statutes, § 539.

“Where a statute prescriptive of a right unknown to the common law is repealed, the remedy is lost

whether the cause of action is still dormant or an action for its prosecution is pending.”

Sutherland on Statutory Construction, 3rd Ed.,
Sec. 2050, Vol. 1, p. 537.

“The effect of repeal of a statute giving a special remedy [without a savings clause] is to obliterate it completely, and it must be considered as a law that never existed except for the purpose of those actions commenced, prosecuted, and concluded while it was an existing law.” (Citing many cases). (Material in brackets added.)

Vance v. Rankin (Ill. 1902) 62 N.E. 807.

The rule has been applied by the Supreme Court of the United States.

In *South Carolina v. Gaillard*, 101 U.S. 433, 25 L.ed. 937. We quote from p. 438 of decision as reported in 101 U.S.:

“This tender was made when a special remedy for its enforcement was allowed. Before Trenholm availed himself of that remedy it was taken away, and he was remitted to such as he had before this Act, or such as were substituted on the repeal, * * *. But whether this be so or not, is unimportant, *because it is well settled that if a statute giving a special remedy is repealed without a saving clause in favor of pending suits, all suits must stop where the repeal finds them.*” (Emphasis added.)

D. DID THE TRIAL COURT ERR IN REJECTING THE INTRODUCTION INTO EVIDENCE OF HOUSE BILL NO. 3? (R. 48, 55.)

Approximately 13 pages of appellant's opening brief are devoted to the legislative history of *the repealing act* and of the alleged failure of the lower court to give proper consideration to extraneous evidence, evidence which is said to have been available.

Most of this discussion deals with matters not only outside the record in this case but unfamiliar and unknown to appellees. Consequently, as a matter of necessity, as well as in accordance with the rules of this court, we will confine ourselves to the record.

Appellant's statement of point (4) and (5) (transcript 71, 72) and specifications of error (4) and (5) (page 12 appellant's opening brief) both confine themselves to the court's refusal to receive certified copies of H. B. No. 3 and S. B. No. 5 in evidence. The offer of proof (transcript 46) shows that only H. B. No. 3 was offered. There is no suggestion in the record that S. B. No. 5 was offered or otherwise brought to the court's attention except as it might have been judicially noticed by reference to the legislative journals. Nevertheless a copy of S. B. No. 5 appears in the transcript at page 53.

We are thus confronted at the outset with the contention that the trial court erred in refusing admission of evidence which was not offered. We refer to S. B. No. 5. Much of the other material in this section of appellant's opening brief is in the same theme. Appellant argues vigorously that the trial court failed to consider much valuable evidentiary matter re-

specting the legislative history of the bill and the intention of the legislators who enacted it. But nowhere is this alleged evidence or a summary of it set forth. Certainly it was not offered during the trial in the lower court. Nor would it have been admissible.

In our view the whole matter is beside the point. The only evidence offered was a certified copy of H. B. No. 3. The court rejected that but immediately took judicial notice of the legislative journals which established everything and more that could and would have been established by H. B. No. 3. The title to the bill and the various amendments offered, rejected and accepted, are all set forth in full in the journals and they are found in the appendix to appellant's opening brief.

Seemingly appellant would have the court consider the certified copy of H. B. No. 3 (and of S. B. No. 5 which was not offered below) and nothing else. If these documents are to be considered at all it must be on the theory that they are part of the legislative history. We do not think that they are. But if they are, they are not to be considered alone. The whole record must be examined. The legislative journals are a part, and we think the only proper part, of that record. Judge Dimond said in *Griffen v. Sheldon*, 11 Alaska 607, 78 F. Supp. 466, cited by appellant on this very point;

“If reference must be made to the journals at all, then the reference should be complete and comprehensive for all proper purposes.”

We do not desire to be understood as implying that the trial court erred in refusing to receive H. B. No. 3 in evidence. We find no case of record (and counsel has cited none) where courts have received exhibits or other evidence outside the record as to legislative intent. Evidence has been received to explain technical terms and expressions, not in common usage, which may be found in statutes under construction by the court and not defined therein. See *Order of Railway Conductors of America v. Swan*, 329 U.S. 520, 67 S. Ct. 405, 408, where the Supreme Court said:

“(2) There is no statutory definition of “yard-service employees”. Nor is the term explained in any of the relevant legislative debates or reports; and it derives no meaning from the statutory policy or framework. Moreover, it is not in common or general usage outside of the railroad world. It is a technical term found only in railroad parlance. Evidence as to the meaning attached to it by those who are familiar with such parlance therefore becomes relevant in determining the meaning of the term as used by Congress. See *O’Hara v. Luckenbach S. S. Co.*, 269 U.S. 364, 370, 371, 46 S. Ct. 157, 159, 160, 70 L.ed. 313.”

The rule stated by the Supreme Court falls far short of permitting reception of evidence outside the legislative record for the purpose of establishing legislative intent. That the Supreme Court will not consider intermediate amendments and parliamentary maneuvers was amply demonstrated in 1947 when in the course of rejecting an argument “grounded in

conclusions drawn from changes without explanation in committee with respect to various provisions finally taking form" the court said:

"Interpretations of statutes cannot safely be made to rest upon mute intermediate legislative maneuvers"

Trailmobile Co. v. Whirls, 331 U.S. 40, 61 S. Ct. 982, 992.

The journals show everything which appellant seeks to establish. Namely, that H. B. No. 3 as originally introduced would have "cancelled, repealed and abrogated" all accrued and unpaid taxes. It further shows that the bill was amended several times and that as finally enacted the section cancelling, repealing and abrogating accrued and unpaid taxes had been stricken and a new section inserted in lieu thereof. The new section provided that the repeal should not be applicable to taxes levied or to be levied during the current year by municipalities, school districts and public utility districts.

Under the well established rule, the court's taking judicial notice of H. B. No. 3 as abstracted in the journal obviated the necessity of proof thereof, so the court considered that bill regardless of whether or not it denied its admissibility into evidence.

20 *Am. Jur.* Sec. 16, Evidence, p. 46 et seq.

Similarly, if the court could take judicial notice of H. B. No. 3 upon the theory that it was a part of the legislative history, it could and undoubtedly did, even though not so stating, take judicial notice of S. B. No. 5.

The legislature had before it the Governor's veto message, (appellant's opening brief, p. 50, App. G), wherein the legislature's attention was specifically called to the Governor's message cited in appellant's opening brief, footnote 5, page 36.

Notwithstanding the House by 20 yeas to 4 nays, and the Senate by 11 yeas to 4 nays, one absent, overrode that veto and passed Chapter 22, *the repealing act*, as it is now before this court.

So, clearly the legislature intentionally saved only municipal, school and public utility taxes as stated in Section 2(a), Chapter 22, and as emphasized in Section 2(b), *ibid.*, and did not save any taxes outside of municipalities, school and public utility districts. The incentive exemption for taxes outside of municipalities, school and public utility districts was not saved because there were no taxes to which such incentive exemption could apply.

What the legislature did is not in doubt or dispute. It considered legislation to repeal the act and cancel all accrued taxes. It considered legislation to repeal the act and cancel none of the accrued taxes. It adopted neither proposal. Judge Hodge correctly summarized the outcome when he said in his opinion:

“Hence it is clear that the final decision of the legislature was neither to abrogate all accrued and unpaid taxes levied under the act, nor to save them, but to save only those taxes levied and assessed by municipalities, school and public utility districts.”

MISCELLANEOUS MATTERS.

1. Remedy for the Collection of Tax on Personal Property.

The argument advanced on p. 22 of appellant's opening brief to the effect that *Chapter 10* as originally enacted provided no remedy for the collection of taxes on personal property is clearly untenable.

Prior to repeal of *Chapter 10* a complete remedy existed. Section 42 of *Chapter 10* (p. 24, App. A, appellant's opening brief) adopted the lien foreclosure procedure found in Section 22-2-8 to 22-2-18 A.C.L.A. by reference. The Tax Commissioner was instructed to proceed "in substantially the manner prescribed" by those sections. It is true that the sections adopted were from a chapter of the Alaska Code dealing with land registration. However, the procedure is as adaptable to personal property as to real property and it was clearly with that view and intent that the legislature adopted them by reference. Sections 22-2-6 and 7 A.C.L.A. 1949 which establish the remedy and the jurisdiction support this view.

2. Alleging Inequity of Lower Court Decision.

Appellant on page 61 of its opening brief infers that the result of the decision of the lower court is unjust as to those who paid the tax levied by *Chapter 10* and permits those who did not pay to "be endowed with favor". Appellant quotes the following language from the trial court's opinion "* * * however unjust such result may be as to those tax payers who paid the property tax *without protest*". (Emphasis supplied.) The following comments are pertinent.

(a) *Chapter 10* was enacted by the Territorial Legislature on February 21, 1949. Taxes became due and payable thereunder during that year. The Attorney General instituted no proceedings for collection until these actions were filed April 9, 1955. He allowed five years to elapse before asserting the Territory's right to collect by suit.

(b) In the meantime the validity of the act was under challenge and this court in *Mullaney v. Hess*, 13 Alaska 276, 189 F. 2d 417, decided on May 10, 1951, pointed out that property owners in Alaska had the right to pay the tax under protest and sue for its recovery. Before the litigation over the validity of the act was finally determined by the decision of this court in *Hess v. Mullaney*, 15 Alaska 40, 213 F. 2d 635 on May 25, 1954, the Territorial Legislature in March of 1953 repealed the act by the passage of *Chapter 10*.

(c) The taxes sought to be collected by this action are not "delinquent taxes" because they fell with the repeal and have ceased to exist. No effort is being made in this case to limit or oppose the taxing power of the Territory. The legislature has simply determined that a previously existing exercise of that power should be nullified by repeal. Our purpose here is to consider the effect and extent of that repeal. The statute under construction is not a revenue law but an act repealing a revenue law.

CONCLUSION.

Neither tax nor remedy survived the repeal. The motion to dismiss was properly granted. The judgment should be affirmed.

Dated, Juneau, Alaska,
July 14, 1956.

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Attorneys for Appellees.

No. 15,070

IN THE

United States Court of Appeals
For the Ninth Circuit

TERRITORY OF ALASKA,

Appellant,

VS.

AMERICAN CAN COMPANY, FIDALGO ISLAND
PACKING COMPANY, LIBBY, MCNEILL &
LIBBY, INC., NAKAT PACKING COMPANY,
NEW ENGLAND FISH CO., P. E. HARRIS
COMPANY, INC., PACIFIC & ARCTIC RAIL-
WAY & NAVIGATION Co., and OCEANIC
FISHERIES Co.,

Appellees.

Upon Appeal from the District Court for the Territory of Alaska,
First Judicial District.

REPLY BRIEF FOR THE APPELLANT.

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FILE

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PAUL P. O'BRIEN, CL

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REPLY BRIEF FOR THE APPELLANT.

INTRODUCTION.

This is a reply brief. Appellant shall not attempt to repeat or restate the arguments already set forth in its main brief. Herein, appellant will deal only with new arguments advanced on behalf of the appellees and with certain specific matters in their brief which seem in most urgent need of correction.

Appellees divide their argument into four main headings and numerous subheadings. As an accommodation to this Court, appellant, in its reply, will follow the order of presentation used by them and refer to only those headings and subheadings to which reply is deemed necessary.

In Re: "A. WILL A PERSONAL ACTION LIE FOR THE COLLECTION OF EITHER REAL OR PERSONAL PROPERTY TAXES LEVIED PURSUANT TO CHAPTER 10, SLA 1949. * * *?" (Appellees' Br. 6.)

In Re: "1. There Is No Statutory Liability."

In its opening brief, appellant, Territory of Alaska, referred to numerous sections in Chapter 10, SLA 1949, the Alaska Property Tax Act (hereinafter designated as Chapter 10) which unequivocally support its contention that appellees are personally liable for any property taxes imposed while the Act was in effect. In their answering brief, appellees have sought to escape the impact of this pertinent statutory language, pinning them to an *in personam* liability by cutting across and casually dismissing in one sweeping paragraph the clear statutory language which states that "Every person shall be assessed and taxed annually on his property." See Section 12 of the Act. Appellee's answer to such compelling language is to this effect:

"All of the sections of the act referred to by appellant (sections 9, 12, 13, 14, 15, 17, 22, 25, 30 and 37) with the exception of section 37 apply to the procedure to be followed in assessing the

property, completing the assessment roll, hearings before the Board of Assessment and Equalization, etc. Section 37 denounces false returns and records.” (Appellees’ Br. 7.)

This unqualified statement, designed to minimize the pertinent law, is made notwithstanding that it is the *person* who is “liable to assessment”, (Section 9); and it is the *person* who “shall be assessed and taxes annually on his property” (Section 12); and on the assessment roll “the arrears of taxes owing by any *persons*” (Section 14(a)(4)) shall be included thereon, etc. The Act is replete with such language, as has been called to the Court’s attention in appellant’s opening brief. (Appellant’s Br. 18, 19, 20, 21.) Where the Act occasionally refers to the property being assessed it is obvious that it is referring to a method of determining the *value* of the property which measures the tax *imposed on the person*. For example, Section 14 states that the contents of the Assessment Roll shall contain, among other things:

“(3) the assessed value, quantity, or amount of said property and taxes thereon;

(4) the arrears of taxes owing by any persons;”

And particularly see Section 11 captioned: “Valuation”, which was apparently intentionally made to precede Section 12 covering “Assessment” of the person.

Appellees refer to Sections 32, 33, 34 and 42 of Chapter 10 and champion these sections as denouncing appellant’s contentions and, conversely, allegedly

supporting their legal theory. (Appellees' Br. 7.) Section 32 denotes the "Time of Payment"; Section 33, the "Mode of Payment"; Section 34, the "Lien", and Section 42, the procedure for the "Recovery of Unpaid Liens". None of these sections reflects any inconsistency with the other sections of Chapter 10 which manifestly make the tax a personal obligation. There is no prohibition precluding the Legislature from looking to both the person and his property as a means of assuring the payment of taxes. In fact, oftentimes, the *in personam* method of recovering taxes is the only way collection can be made from recalcitrant taxpayers who receive personal property from the taxing jurisdiction.

Appellees trod on the alleged ineptness of those who drafted Chapter 10 and find great comfort in the insufficiency of the title. (Appellees' Br. 8.) The English Courts gave no credence whatever to the title and disregard it as a part of the Act, thus voiding its use as a means of interpreting the meaning of the act itself. However, in the United States the title is alluded to, along with other aids, in that singular instance when its use will help clarify an existing ambiguity. In no event is this objective test ever justifiably employed when it results in a voidance of the subjective legislative intent clearly manifested in the Act or by other evidence.

In Re: "3. The Rule in Other Circuits." (Appellees' Br. 10.)

Appellees quote the alleged "rule in other circuits" regarding the recovery of taxes, stating:

“The rule denying an equitable action for recovery in the absence of statute was announced as a fundamental principle of law by the Sixth Circuit Court of Appeals, in *Preston v. Sturgis Milling Co.* (1910) 183 F. 1, and personal liability was denied for lack of legislative authority by the Eighth Circuit Court of Appeals in *Helvering v. Johnson County Realty Company* (1922) 128 F. 2d 716. * * *” (Appellees’ Br. 10.)

Appellant, Territory of Alaska, is not looking to “equitable action” to recover its taxes. It seeks to employ the common law actions of “debt” or “assumpsit” and, thereafter, if necessary, to foreclose those property tax liens where recovery cannot otherwise be had.

As to *Helvering v. Johnson County Realty Company* (cited by Appellees in the above quotation), that case hinges on the laws of Iowa which apparently specifically hold that no personal liability exists. There is nothing before this Court and nothing was presented in the lower court to compare the Iowa taxing statutes with the language of the Alaska Property Tax Act.

In Re: “4. The Text Writers.” (Appellees’ Br. 10.)

Appellees cite “Cooley on Taxation, 4th Ed., Vol. 3, p. 2630, Section 1330” as its sole authority under this heading. They state the rule cited by Professor Cooley to be as follows:

“However, in most jurisdictions it is held that statutory remedies for the collection of delinquent taxes are exclusive and preclude the maintenance

of an action at law, i.e., that when the statute undertakes to provide remedies, and those given do not embrace an action at law, a common-law action for the recovery of the tax as a debt will not lie.”

Here is the *full text* of what Professor Cooley actually says:

“In some states it has been held that an action at law may be maintained to collect taxes although a statute provides a special remedy for their collection, unless the statutory remedy is in terms made exclusive. However, in most jurisdictions it is held that statutory remedies for the collection of delinquent taxes are exclusive and preclude the maintenance of an action at law, i.e., that when the statute undertakes to provide remedies, and those given do not embrace an action at law, a common-law action for the recovery of the tax as a debt will not lie. Furthermore, some decisions hold that even where the statute which prescribes a special remedy for collection, other than a personal action, is inadequate or ineffectual, the statutory remedy is exclusive, *but the general rule is that if the statutory remedy is inadequate or ineffectual a personal action to recover the tax will lie. An action to recover taxes is not precluded by statutory remedies which clearly are not exclusive, * * *.*” (Numerous cases cited in the footnotes thereof.) (Emphasis added.)

In Re: “5. Taxes Are Not Debts.” (Appellees’ Br. 11.)

Whether taxes are or are not “debts” is a matter of conflict in many jurisdictions. However, the later

Supreme Court decisions cited by appellant in its opening brief (Appellant's Br. 25) appear to support the conclusion that taxes can be regarded as debts for the purposes of collection when the taxing statute does not prescribe an altogether exclusive remedy or if the remedy is insufficient.

The case of *Meriwether v. Garrett*, 102 U.S. 472, 26 L. Ed. 197, decided in 1880, is alluded to by the appellees in three different instances (Appellees' Br. 11, 15 and 29) for the alleged proposition that "taxes are not debts". However, this authority was easily explained and limited to its facts by the Supreme Court in *Price v. United States*, 269 U.S. 492, 501-2, 70 L. Ed. 373, 378:

"Lane County v. Oregon, 7 Wall. 71, 19 L. Ed. 101, and *Meriwether v. Garrett*, 102 U.S. 472, 26 L. Ed. 197, are sometimes cited, and expressions found in the opinions are quoted, to show that taxes are not debts. But when regard is had to the questions decided in these cases, it is clear that they do not sustain the view that, as used in sec. 3466, the word 'debts' does not include taxes due the United States. The question in *Lane County v. Oregon* was whether under the acts of Congress making United States notes 'legal tender in payment of all debts', the state was bound to accept such notes in payment of taxes required by its own laws to be paid in gold and silver coin. The court held that the acts had no reference to taxes imposed by state authority. There were two clauses which were intended to give currency to the notes. In one of them, taxes were plainly distinguished from debts; and it was

held that the word 'debts' in the other was not intended to include taxes. In *Meriwether v. Garrett*, it was held that taxes levied before the repeal of a city charter—other than those levied under lawful contract or judicial direction—could not be continued in force by the court after the repeal of the charter; that they had none of the elements of property and could not be seized by judicial process, and could only be collected under authority from the legislature.”

The Supreme Court was emphatic when it stated on page 378:

“In the absence of another remedy made exclusive, an action of debt lies to recover taxes where the amount due is certain or readily may be made certain.” Page 378, quoting *U. S. v. Chamberlin*, 219 U.S. 250, 55 L. Ed. 204, 210; *Dollar Savings Bank v. U. S.*, 22 L. Ed. 80, 82, 19 Wall. 227, and many other cases.

Appellees also claim precedence in an Alaskan case, *In regard to Street Assessment in the Town of Seward* (1917), 5 Alaska 726, 727, wherein, and by way of dicta, the Court held that taxes are not debts in the ordinary sense of that word. That case involved an attempt by the taxpayer to setoff city taxes against an alleged tort claim. The Court struck down this attempt to thwart the collection of taxes and denied the right of setoff, stating that:

“It would seem that any other rule would render exceedingly difficult, if not impossible, the collection of taxes, as persons would be setting up some claim, real or imaginary, for delay against

the municipality, and thus defeat the highly important and necessary collection of public revenues.”

In Re: “6. The Action Is In Rem—Not In Personam.” (Appellees’ Br. 12.)

Appellees contend the alleged rule of law is that a tax levied against property cannot be collected by a proceeding *in personam*. This would perhaps be true were it not that taxes under Chapter 10 are imposed against the *person*.

In Re: “7. Appellant’s Authorities.” (Appellees’ Br. 15.)

Furthermore, and as was called to the Court’s attention in Appellant’s Opening Brief at page 22, in many states even where the tax is solely *on the property*, the owner thereof has been held personally liable. Appellant cited thirteen state decisions and one Federal decision in its opening brief supporting this legal proposition. In refutation of these cases, the appellees state:

“* * * A careful reading of all the state decisions and of the authorities cited in them, discloses that in each case some provision of the state statute was relied upon as the basis of personal liability. * * *” (Appellees’ Br. 15.)

Appellant disagrees with this statement if it is intended to imply that specific statutory language existed in each instance imposing personal liability. All of the cases cited refer to a *tax solely on property* and make no mention of personal tax liability based on any tax legislation. Appellant checked its author-

ities on three different occasions and made certain that it was precise in its representation to this Court.

In Re: "B. DID ANY OF THE TAXES SOUGHT TO BE COLLECTED IN THIS ACTION SURVIVE THE REPEAL OF CHAPTER 10, SLA 1949 BY CHAPTER 22, SLA 1953?" (Appellees' Br. 16.)

The argument under this portion of appellees' brief has its reply in the appellant's brief starting at page 30, et seq. However, one particular point is called to this Court's attention. On pages 31 through 34, the appellees engage in considerable speculation as to what *factual* inducements moved the Legislature to pass Section 2 of Chapter 22, SLA 1953, the all-important Section in this litigation. They have now mended their approach and for the first time indicate a realization of the importance of analyzing this Section, although they did not do so before the District Court. They freely engage in presenting a self-supporting hypothecation of what they believe motivated the lawmakers, although they introduced no evidence supporting their factual assertions. It is striking proof of one of appellant's principal theseis that only with the admission of documentary and other evidence can an ascertainment of the true intent of the Legislature, which is a *factual* question, be made.

In Re: "4. No Remedy Exists." (Appellees' Br. 38.)

Throughout their brief, appellees take pains to explain the distinction between the *right* to tax and the *remedy* to collect such taxes once assessed. Under

the above heading, the appellees contend that no *remedy* remains to the Territory under Chapter 22, the repealing Act, to *collect* any taxes even if it be conceded that such taxes survived the latter Act. However, paradoxically, they still recognize the existence of a remedy in municipalities, school and public utility districts to collect accrued and current taxes (Appellees' Br. 38), *notwithstanding that, as in the case of the Territory, no such remedy was specifically saved under Chapter 22 to these political subdivisions*. Thus, appellees are inconsistent in their legal stand. They must take the position that either Chapter 22, which makes no mention of a remedy, voids the collection of any taxes, or in the alternative that the Act *recognizes an implied right of collection* of all taxes whether it be by the Territory, municipalities or school and public utility districts. They apparently recognize such an implied right in municipalities, school and public utility districts but refuse to acknowledge such an implied right in the Territory.

Beginning on page 38 of Appellees' Brief, they cite *Schmuck v. Hartman*, 70 Atlantic 1091, 1092, together with 50 Am. Jur., pages 535, 536, *Statutes*, Section 539, and Volume 1, *Sutherland on Statutory Construction*, Third Edition, page 537, Section 2050, for the proposition that a pre-existing remedy is lost by repeal. These authorities are all inapplicable, since they are predicated on the nonexistence of a general savings clause.

In Re: "D. DID THE TRIAL COURT ERR IN REJECTING THE INTRODUCTION INTO EVIDENCE OF HOUSE BILL NO. 3?" (Appellees' Br. 41.)

General accusations are made by the appellees to the effect that "matters" were discussed by the appellant which were "not only outside the record in this case but unfamiliar and unknown to appellees". (Appellees' Br. 41.) No specific "matters" are identified, other than Senate Bill No. 5, and appellant is mystified and at a loss to decide what appellees are alluding to by their broad blanket indictment.

Senate Bill No. 5 was identical in all respects to House Bill No. 3, the introduction of which was rejected by the District Court. Although it was repetitious, an official authenticated copy was submitted with the Territory's brief and formally filed in the District Court. Alternatively, it could have been called to the Court's attention by citing page 32 of the 1949 Senate Journal (which is conceded by the appellees to be subject to judicial notice) wherein the word-for-word likeness of the *title* of Senate Bill No. 5 and House Bill No. 3 clearly indicates both bills to be indistinguishable in form, design or purpose.

Under heading "D" the appellees argue: (1) House Bill No. 3 is not admissible evidence and (2) even if admissible, it serves no purpose.

In support of the first argument appellees seek to have this Court condone and adopt a new rule of statutory construction to the effect that only matters which explain "technical terms and expres-

sions, not in common usage", can be admitted into evidence. (Appellees' Br. 43.)

This suggested limitation, ostensibly severe in application, has no justifiable basis or reason for existence. The prime objective in construing statutes is to determine the legislative *intent*. An understanding by the Court of "technical terms and expressions, not in common usage" is but one means of determining that intent. All words being, at best, inexact tools of expression, every relevant aid, extrinsic or otherwise, should be sought in construing laws. To limit extrinsic evidence to that which will explain "technical terms" and nothing more is an unnecessary restraint which thwarts the paramount target of a court, i.e., the determination of the legislative intent.

The gist of the second argument posed by the appellees under this subheading is that even if House Bill No. 3 was admitted, it serves no purpose. This attitude is diametrically opposite to appellees' position in the District Court where they fought so strenuously—and successfully—to keep House Bill No. 3 from being admitted into evidence. Appellees now state:

"Under the well established rule, the court's taking judicial notice of H. B. No. 3 as abstracted in the journal obviated the necessity of proof thereof, so the court considered that bill regardless of whether or not it denied its admissibility into evidence." (Appellees' Br. 44.)

This is a misleading statement. House Bill No. 3 is not "abstracted in the journal". Nowhere therein

does the original language of the Bill appear where, if enacted, "accrued and unpaid taxes" would have been "cancelled, repealed and abrogated, and declared null and void". (See original House Bill No. 3, Tr. 56.) It has been appellant's contention throughout that by refusing to pass the bill in its original form the Legislature clearly manifested an emphatic denunciation to grant the immense tax windfall appellees are now claiming.

In Re: "MISCELLANEOUS MATTERS." (Appellees' Br. 46.)

In Re: "1. Remedy for the Collection of Tax on Personal Property." (Appellees' Br. 46.)

As to appellees' contention that the procedure of foreclosing liens on property under Section 22-2-8-22-2-18 ACLA 1949, incorporated in Section 42 of Chapter 10, is equally applicable to personal property as to real property, such an assertion is without merit. There are many other Sections in the Code which could have been alluded to and incorporated in Chapter 19 as a preferred method by which liens against personal property could be foreclosed. See Sections 16-1-115, 22-6-10 and 26-9-3, ACLA 1949. Even upon a cursory examination, it is immediately discernable that the Legislature omitted to provide for the collection of taxes on personal property except by such remedies as existed at common law. The general rule, as previously stated, is that if the statutory remedy is inadequate, ineffectual or not exclusive, a personal action to recover the tax will lie. See

Volume 3, *Cooley on Taxation*, Fourth Edition, page 2629, Section 1330.

In Re: "2. Alleging Inequity of Lower Court Decision." (Appellees' Br. 46.)

Appellees attempt to refute the Territory's argument that it will be unfair and unjust if taxes are not collected from those who have intentionally violated and resisted Chapter 10 during the years it was in force, by quoting the District Judge's trial court opinion. In his opinion the Court concluded that taxes owed by tax violators were to be excused,

"* * * however unjust such result may be as to those taxpayers who paid the property tax without protest".

This is another erroneous assumption. Had any taxpayer paid his tax under protest during the years it was in force, they could not recover said taxes regardless of the outcome of this suit because the validity of this taxing statute has been substantiated. See *Mullaney v. Hess*, 15 Alaska 40, 213 F. 2d 635. It is inescapable that tax violators are now being endowed with favor while those who acted in a lawful and diligent manner and paid their taxes when due—under protest or otherwise—are being unduly penalized, a result necessarily outrageous to the average taxpayer and to the appellant.

CONCLUSION.

For the reasons stated in Appellant's Opening Brief, it is submitted the District Court's judgment should be reversed.

Dated, Juneau, Alaska,
September 5, 1956.

Respectfully submitted,

J. GERALD WILLIAM,
Attorney General of Alaska,

HENRY J. CAMAROT,
Assistant Attorney General of Alaska,
Attorneys for Appellant.

No. 15,081

IN THE

United States Court of Appeals
For the Ninth Circuit

COY C. GOODRICH,

Appellant,

VS.

THE UNITED STATES OF AMERICA,

Appellee.

On Appeal from the United States District Court for the
Northern District of California.

BRIEF OF APPELLEE.

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No. 15,081

IN THE
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For the Ninth Circuit

COY C. GOODRICH,

Appellant,

vs.

THE UNITED STATES OF AMERICA,

Appellee.

On Appeal from the United States District Court for the
Northern District of California.

BRIEF OF APPELLEE.

JURISDICTION.

On May 27, 1954 the appellant filed a petition for an arrangement under Chapter XI of the Bankruptcy Act (Tr. 1-6). The petition was filed pursuant to Section 322 of the Act, 52 *Stat.* 907 (1938), as amended, 11 *U.S.C.* Section 722 (1952), and was referred to Burton J. Wyman, Referee in Bankruptcy (Tr. 10-11), pursuant to Section 331 of the Act, 52 *Stat.* 908 (1938), as amended, 11 *U.S.C.* Section 731 (1952). Thereafter, on June 29, 1954, the appellant petitioned the United States District Court to dismiss the proceedings (Tr. 14-27), which matter was also referred

to the referee. Extensive hearings were held on the appellant's petition to dismiss, and on December 1, 1954 the referee denied the petition to dismiss. (Tr. 76.)

On December 10, 1954, the appellant petitioned to the United States District Court to review the judgment of December 1, 1954. (Tr. 77.) Jurisdiction for that proceeding existed under Section 302 of the Act, 52 *Stat.* 905 (1938), as amended, 11 *U.S.C.* Section 702 (1952), which made applicable the provisions of Sections 2(a)(10), 39(a)(8) and 39(c) of the Act, 30 *Stat.* 545 and 555 (1898), as amended, 11 *U.S.C.* Sections 11 and 67 (1952).

On November 15, 1955 the United States District Court affirmed the referee's order. (Tr. 188.) The appellant filed a notice of appeal on December 13, 1955. (Tr. 189.)

Jurisdiction of this Court is invoked pursuant to Section 316 of the Act, 52 *Stat.* 907 (1938), as amended, 11 *U.S.C.* Section 716 (1952). That section makes applicable to proceedings under Chapter XI the provisions of Section 24, 30 *Stat.* 553 (1898), as amended, 11 *U.S.C.* Section 47 (1952).

OPINION BELOW.

"ORDER AFFIRMING REFEREE'S ORDER

"The facts show, and the Referee was fully justified in finding, that Coy C. Goodrich was in fact and truth the owner of the business and assets of Goodrich Man-

ufacturing Co., and that his wife's interest therein and in and to the assets, real or personal, of said business, was her community interest therein, as his wife, under the laws of the State of California.

"That being so, the description used to designate the identity and status of the petitioner, Coy C. Goodrich in the petition for an arrangement, is immaterial and of no moment.

"In my opinion, therefore, the present proceeding should continue, with or without amendment to the petition, in full accord with the provisions and purposes of the applicable provisions of the statutes.

"The order of the Referee denying the motion to dismiss the proceeding, is affirmed. The cause is remanded to the Referee with directions to proceed with the administration of the estate of Coy C. Goodrich agreeably to the applicable statutes and rules.

Dated: November 14, 1955.

Louis E. Goodman,
United States District Judge."

STATEMENT OF THE CASE.

The appellant executed two contracts for small arms with the Government through the Department of the Army. Contract No. DA 11-07-Ord-6384 awarded on February 29, 1952 (Debtor's Exhibit 2) provided for the delivery of cartridge extractors at a price of \$183,863.15 with deliveries commencing January 31, 1952. On June 30, 1952, contract No. DA-19-058-Ord-

7015 (Debtor's Exhibit 3) was awarded. That contract provided for special small arms tools at a total cost of \$379,440, and established a delivery schedule beginning November 1952. Due to lack of working capital, the appellant was unable to meet these delivery schedules. To enable completion of the contract, the Government executed Supplemental Agreement No. 2 to contract No. 6384 and Supplemental Agreement No. 1 to contract No. 7015 providing for progress payments. The Supplemental Agreements were essentially identical, permitting the contracting officer to advance funds to the appellant based upon a percentage of work in progress. Paragraph A of the Supplement in each case provided:

“(A). The contracting officer may, from time to time, authorize progress payments to the contractor . . . and . . . in no event shall the total of unliquidated progress payments . . . and of unliquidated advance payments, if any, made under this contract, exceed 80% of the total contract price of supplies still to be delivered.”

Pursuant to these provisions the appellant received \$296,836.69 in advance of deliveries under the contract. (Tr. 104.)

It was evident that the appellant was having difficulty completing the contracts. The Government supplied a production engineer to assist appellant. (Tr. 446-447.) The operation of the appellant, however, continued to result in accumulation of unpaid debts and wages, and a continuing threat of judicial process as a method of collection existed.

These factors motivated the Government to refuse to make any further advance payments on the contract since the payment of any progress payments was within the discretion of the contracting officer (Debtor's Exhibits 2 and 3). In addition, the progress payments had already exceeded the maximum amount provided in the supplemental agreements in that more than 80% of the total contract price of supplies still to be delivered had been advanced. Representatives of the Government advised the appellant that if a Chapter XI proceeding were instituted under the Bankruptcy Act, it was their belief that arrangements could be made for further progress payments. However, it is clear that such payments would have required an amendment to the supplemental agreement. And even if the supplement were amended, payment would continue to be in the discretion of the contracting officer. At all times, however, the Government was willing to accept delivery under the contracts. (Testimony of appellant, Tr. 229, and the contracting officer, Tr. 445.)

Appellant, on or about May 20, 1954, consulted Angelo J. Scampini, an attorney, in relation to procedure under Chapter XI of the Bankruptcy Act. (Tr. 46.) Appellant informed his attorney, and August B. Rothschild, another attorney consulted in relation to a Chapter XI proceeding, that Goodrich Manufacturing Co. was owned by himself and Lulu Goodrich. (Tr. 15, 210, 418-9.) Thereafter, the affidavits, schedules and petition were filed with the United States District Court. In each affidavit, schedule, and other accom-

panying document, Coy C. Goodrich and Lulu Goodrich stated that the business was a partnership composed of themselves. (Tr. 1, 5, 6, 27, 29, and 30.) The Goodriches became dissatisfied with their attorneys, replaced them, and filed a petition to dismiss the Chapter XI proceeding. Grounds for this petition were: (1) no partnership existed and (2) the appellants were fraudulently induced to enter into the Chapter XI proceedings by the Government. Extensive hearings were held before the Hon. Burton J. Wyman, Referee in Bankruptcy, at which hearings the Government, various creditors represented by Mr. Frederick J. Schoeneman, an attorney (Tr. 267), and Mr. Gerald L. Tesman, a creditor (Tr. 332), objected to the dismissal.

In an opinion filed December 1, 1954, the Referee in Bankruptcy denied the petition to dismiss the Chapter XI arrangement proceeding. (Tr. 179.) In his findings the Referee stated that the entity was a community copartnership (Tr. 158), that it was for the best interests of the creditors of the appellant that the arrangement proceedings not be dismissed (Tr. 165) and that the Department of the Army did not make false promises or coerce the appellant into petitioning for a Chapter XI arrangement. (Tr. 167-8.)

The Referee's decision was affirmed and modified by the United States District Court in its order dated November 15, 1955. The District Court modified the finding that Goodrich Manufacturing Company, the appellant, was a community copartnership. The Court held that the appellant was operated by Coy C. Good-

rich individually, and that the entire assets of the business were community property under the laws of California.¹ The appeal was taken from this Order.

DESIGNATION OF POINTS.

1. Was it error for the Court to amend the name of the appellant to reflect the true identity of the petitioner?

2. Did the Government have standing to object to the appellant's petition to dismiss the proceedings?

3. Did the Government promise the appellant that additional funds would immediately be forthcoming if the debtor filed a proceeding under Chapter XI of the Bankruptcy Act? If so, do these misrepresentations require a dismissal of the entire proceeding?

SUMMARY OF THE ARGUMENT.

1. The Referee and the District Court had power to correct the name of the petitioner to reflect the true identity of the entity before the Court. The appellant testified that it was his intention to secure an arrangement for the Goodrich Manufacturing Company. The fact that the attorneys erred in labeling the entity

¹Although the opinion of the District Court does not expressly state that the Referee's finding is modified, there is no other conclusion. The opinion states that the Goodrich Manufacturing Company was owned by Coy C. Goodrich and that the interest of Goodrich's wife was community property. This is inconsistent with the Referee's findings. The opinion of the District Court, being so explicit in the nature of the entity, serves as a finding of fact, *Yanish v. Barber*, 232 F.2d 939 (9th Cir. 1956), and is reviewable by this Court.

does not prevent correcting that error. Coy C. Goodrich intended to place himself and the Goodrich Manufacturing Company in the arrangement proceeding. The District Court had the power to reflect this intention.

2. The United States had standing to protest the dismissal. In the schedules filed in the arrangement proceeding, the appellant listed the United States as a creditor. This, in itself, would be sufficient to entitle the United States to object to the dismissal. However, also in evidence were the contracts between appellant and the Department of the Army, together with appellant's own statements that he had received money in excess of deliveries under the contracts. Accordingly, the United States was a creditor within the meaning of Section 1 (11) of the Act, 30 *Stat.* 544 (1898), as amended, 11 *U.S.C.* Section 1 (1952).

3. The contention that misrepresentations by the Department of the Army induced filing the Chapter XI proceeding is not a basis for dismissing the proceeding. And, assuming such would be a valid basis for dismissal, no misrepresentations were made.

ARGUMENT.

1. DID THE COURT ERR IN AMENDING THE NAME OF THE PETITIONING DEBTOR.

(a) It is apparent that Coy C. Goodrich intended to place the entity which was performing government contracts into the arrangement proceeding. The petition filed on May 27, 1954, and the accompanying

schedules, permits no other conclusion. The petition stated that the debtor was performing two contracts for the Department of the Army. (Tr. 2.) The schedule of assets and liabilities (Tr. 5) were the assets and liabilities of the Goodrich Manufacturing Company. The statement of affairs and accompanying schedules (Tr. 104-15) were the affairs and schedules of the Goodrich Manufacturing Company. This was the petitioning entity. To recognize that any other debtor had petitioned and accompanied the petition with these schedules of debts and assets, would be to accuse Coy C. Goodrich of filing false and fraudulent papers with the United States District Court.

The appellant did not choose the legal classification attached to his business in the petition. When asked who owned the Goodrich Manufacturing Company and the real property, Coy C. Goodrich advised his attorney that it was owned by himself and his wife. (Tr. 46.) When asked who owns the property and the business, Coy C. Goodrich replied, "My wife and I." (Tr. 378.) And, when further questioned concerning the operation of the business, he replied that it was conducted as "community property." (Tr. 378.) It was the attorney who characterized the business as a partnership. It was the attorney's intention to place the entity which had the contracts with the Department of the Army, into the arrangement proceeding. With this intention, he prepared the documents and secured the signatures of Coy C. Goodrich and Lulu Goodrich.

The testimony supports the conclusion that the petitioner was the Goodrich Manufacturing Co., a sole

proprietorship. The assets stated as the assets of the petitioning debtor were the individual assets of Coy C. Goodrich. (Tr. 203.) The contract listed as an asset of the petitioning debtor was the contract of Coy C. Goodrich individually. (Tr. 204.) In response to questions concerning the petition, Coy C. Goodrich gave the following answers (Tr. 204-6):

“Question: Would you state whether or not the allegations and the facts set forth in the documents we have already referred to were intended by you at the time you filed those documents to be statements of you as an individual and regarding your individual proprietorship?

Answer: Well, at the time I considered myself the only one that was doing it.

Question: Thus, you intended to make these statements regarding your individual proprietorship and on behalf of your individual proprietorship. Is that correct?

Answer: Yes.

Question: So, Mr. Goodrich, when you filed your petition on May 27, 1954, it was your intention to bring Goodrich Manufacturing Company as your individual proprietorship before the Court. Is that correct?

Answer: Yes.

Question: Would you state whether or not it was your intention at that time to have the Court act upon your individual debts and liabilities and executory contracts?

Answer: Yes.”

Coy C. Goodrich and his attorney both intended to place the operating organization of Goodrich Manufacturing Company before the Court. This being so, and the Court having jurisdiction over the entity, the Court has the power to correct the pleadings to reflect the true name of the party.

Randolph v. Barrett, 41 U.S. 138 (1842);

Nelson v. Jadrijevics, 59 F.2d 25 (5th Cir. 1932);

Salyer v. Consolidation Coal Co., 246 Fed. 794 (6th Cir. 1918);

St. Louis and S.F. Ry. v. Herr, 193 Fed. 950 (5th Cir. 1912);

Hernan v. American Bridge Co., 167 Fed. 930 (6th Cir. 1909);

McDonald v. Nebraska, 101 Fed. 171 (8th Cir. 1900);

Tibbs v. Parrott, 23 Fed. Cas. 1196 (D.C. Cir. 1804);

Evans v. Thompson, 121 F. Supp. 46 (W.D. Ark. 1954);

Browder v. Cook, 59 F. Supp. 225 (D. Idaho 1944);

In re Young, 223 Fed. 659 (D. Mass. 1915);

In re Richardson, 192 Fed. 50 (D. Mass. 1911).

Thus, in *Evans v. Thompson*, 121 F. Supp. 46 (W.D. Ark. 1954), the Court permitted an amendment to show that the defendant was not an individual, but was a partnership, and permitted amending the name of the defendant to include the remaining partners of the partnership. And in *Nelson v. Jadrijevics*, 59 F.2d

25 (5th Cir. 1932), the Court permitted amending the defendant's name to show that the defendant was a sole proprietorship and not a corporation as originally named. The basis for this decision was that the issue was whether the party was before the Court. Similarly, in *In re Young*, 223 Fed. 659 (D. Mass. 1915), the name of the partnership was dropped from the defendant's description, and the action was continued against a named partner alone. In *Salyer v. Consolidation Coal Company*, 246 Fed. 794 (6th Cir. 1918), the Court permitted the plaintiff to amend and substitute a new plaintiff where the original plaintiff had no capacity to institute the action. Similarly, in *McDonald v. State of Nebraska*, 101 Fed. 171 (8th Cir. 1900), the plaintiff was allowed to substitute a new party plaintiff by amendment.

The issue in the above cases was whether the party brought in by the amendment was before the Court under the original pleading. If so, the amendments were allowed without exception. The present petition was filed with the intention that the entity consisting of the Goodrich Manufacturing Company would proceed by arrangement. It was only through the attorney's error that the entity was labeled a partnership. Under these circumstances, there is no doubt that the Court had the power to amend the pleadings to reflect the true identity of the petitioner.

(b) If the petition must be considered the petition of a partnership, then the Court has power to amend the designation of the petitioner. Although section 5 of the Bankruptcy Act, 30 *Stat.* 547 (1898), as amended,

11 U.S.C. Sec. 23 (1952), recognizes the existence of a partnership entity for some purposes, that section does not eliminate the common law concept of the partnership. The partnership is composed of the individual partners. Jurisdiction over the partnership is jurisdiction over the individual partners.

Francis v. McNeal, 228 U.S. 695 (1913).

In *Francis v. McNeal* the Court held that jurisdiction over the partnership was also jurisdiction over the estates of the individual partners, stating:

“But we do not perceive that the clause imports that the partnership could be in bankruptcy and the partners not.”

Francis v. McNeal, 228 U.S. 695, 701 (1913).

The common law concept of the partnership was not rejected in *Liberty National Bank of Roanoke v. Bear*, 276 U.S. 215 (1928). The meaning of that decision, as stated by the Court, is that an adjudication of bankruptcy of the partnership is not an adjudication of the individuals.

This Court recognized the limitation of *Liberty National Bank of Roanoke v. Bear*, supra. In *Mason v. Mitchell*, 135 F.2d 599 (9th Cir. 1943) this Court stated:

“First, the legal fiction of separate entity as applied to corporations or partnerships is purely a linguistic device utilized for conceptual convenience. It is not a premise to be reasoned from, but merely a shorthand statement of a conclusion. Thus, though the Supreme Court or the statute may in effect treat a partnership as an ‘entity’

for some purpose, such treatment alone in no way aids in the solution of the problem. . . . Further, in answer to appellant's argument that Section 5 subs. (a) and (b) establish congressional adoption of the 'entity' theory, it may be pointed out that in Section 5, subs. (c), (i), and (j) are as clearly predicated upon the 'aggregate' theory. Therefore, it is apparent that these aspects of the statute do not provide a solution to the question . . ."

Mason v. Mitchell, 135 F.2d 599, 600-01 (9th Cir. 1943).

The import of the decisions in *Francis v. McNeal*, 228 U.S. 695 (1913) and *Mason v. Mitchell*, 135 F.2d 599 (9th Cir. 1943), is that jurisdiction over the partnership gives the Court jurisdiction over the individual partners. Jurisdiction over the alleged partnership of Coy C. Goodrich and Lulu Goodrich in the Goodrich Manufacturing Company, placed the individuals within the jurisdiction of the District Court. The Court, therefore, had power to amend the petition to reflect the true identity of the parties who had voluntarily appeared before the Court. See *In re Richardson*, 192 Fed. 50 (D. Mass. 1911).

2. THE APPELLANT HAS NO ABSOLUTE RIGHT TO DISMISS THE PETITION.

Although no procedure is established for dismissing a petition, either in bankruptcy or for an arrangement, General Order 37, 11 *U.S.C.* following Section

53 (1952), makes the Federal Rules of Civil Procedure applicable "in proceedings under the Act" unless "inconsistent" with the Act.

Rule 41 of the Federal Rules of Civil Procedure permits a dismissal without an order of the Court if no pleading has been filed by an adverse party. Thus, dismissal under the Federal Rules, would be a matter of right. However, Section 59(g) of the Act, 30 *Stat.* 561 (1898), as amended, 11 *U.S.C.* Section 95(g) (1952), permits dismissal only upon notice to creditors. Rule 41 is thus, inconsistent, and inapplicable. The petitioner must show a right to a dismissal. Accordingly, dismissal under the Bankruptcy Act is within the discretion of the Court.

In re Thorpe, 12 F.2d 775 (7th Cir. 1926);

In re Browne, 30 F.Supp. 157 (E.D.N.Y. 1939);

In re Sullivan, 23 F.Supp. 142 (N.D. Ga. 1938).

3. THE GOVERNMENT HAD STANDING TO OBJECT TO DISMISSAL OF THE PROCEEDINGS.

The appellant concedes that if the Government is a creditor of the debtor, then the Government has standing to object to the dismissal of the petition. It is the position of the appellee that status as a creditor is sufficiently established through one of three means: (1) By the debtors listing the Department of the Army as a creditor in his schedules (Tr. 101 and 104); (2) the Government is a creditor within the

meaning of Sections 302 and 307 of the Bankruptcy Act, 52 *Stat.* 905 and 906 (1938), as amended, 11 *U.S.C.* Sections 702 and 707 (1952); or (3) the Government is a creditor by virtue of the taxes due and unpaid. (Tr. 101 and 104.)

(a) Listing the Government as a creditor provides standing to object. No specific procedure is provided for dismissal of an arrangement. Section 59 of the Act, 30 *Stat.* 561 (1898), as amended, 11 *U.S.C.* Section 95 (1952), which is made applicable by Section 302 of Chapter XI of the Act, 52 *Stat.* 905 (1938), as amended, 11 *U.S.C.* Section 702 (1952), assumes that a petition to dismiss may be filed. Section 59(g) provides in part:

“A voluntary . . . petition shall not be dismissed upon the application of the petitioner or petitioners . . . until after notice to the creditors...”

Since the petition may be filed prior to any meeting of persons claiming to be creditors, the reference to creditors in Section 59 must refer to those persons listed by the debtor. Otherwise, there would be no method of determining to whom notice should be sent.

Also, listing of a creditor should conclusively establish standing to object to the dismissal for another reason. If the Court were required to determine who is a creditor, the hearing on the petition to dismiss would become a summary proceeding to determine the validity of creditors' claims. Such procedure would cause excessive delay, and would not adhere to the purpose of the Act to facilitate expeditious handling of the estate.

(b) The Government is a creditor within the meaning of Sections 1(11) and 307 of the Bankruptcy Act.

(1) *Section 307*. If the arrangement plan provides for an extension of time for payment of debts, Section 307 of the Act creates a broad definition of creditors. That section provides as follows:

“(1) Creditors shall include the holders of all unsecured debts, demands, or claims of whatever character against a debtor, whether or not provable as debts under Section 63 of the Act, and whether liquidated or unliquidated, fixed or contingent; and

“(2) Debts or claims shall include all unsecured debts, demands, or claims of whatever character against a debtor, whether or not provable as debts under Section 63 of the Act and whether liquidated or unliquidated, fixed or contingent.”

52 *Stat.* 906 (1938), as amended, 11 *U.S.C.* Section 707 (1952).

There can be no doubt that the advance payment by the Government to the appellant pursuant to the provisions of the contract were an unliquidated contingent claim. As such the Government became a creditor within the meaning of Section 307.

(2) *Section 1(11)*. If the arrangement contemplates a composition, then the definition of a creditor is narrower. Section 302, 52 *Stat.* 905 (1938), as amended, 11 *U.S.C.* Section 702 (1952), makes applicable the definitions of Section 1 of the Act. Section 1 provides:

“(11) Creditor shall include anyone who owes a debt, demand, or claim provable in bankruptcy and may include his duly authorized agent, attorney, or proxy.”

30 *Stat.* 544 (1898), as amended, 11 *U.S.C.* Section 1(11) (1952).

Section 63 of the Act provides that debts may be proved which are contingent and founded upon express or implied contractual liabilities. 30 *Stat.* 562 (1898), as amended, 11 *U.S.C.* Section 103(4) and (8) (1952). The Government's claim being based upon advance payments made pursuant to the contracts with the appellant, are debts founded upon either “a contract express or implied” or contingent contractual liabilities. As such, they are provable within the meaning of Section 63 of the Bankruptcy Act, and the Government is a creditor within the meaning of Section 1 (11) of the Act.

(c) Disregarding the claim under the contracts, the Government is a creditor by virtue of taxes due and owing. The appellant listed unpaid taxes as a debt due. (Tr. 101, 104.) Debts arising from unpaid taxes are provable within the meaning of Section 63.

Ingels v. Boteler, 100 F.2d 915 (9th Cir. 1938),
aff'd 308 U.S. 57.

In any event, it would seem immaterial whether the Government was a creditor of the appellant, since another creditor of the appellant objected to the dismissal. The testimony of Gerald L. Tesman was as follows (Tr. 332):

“Question: Did you authorize Mr. Schoeneman to come into court on your behalf and oppose Mr. and Mrs. Goodrich’s application to dismiss this proceeding?”

Answer: I did.”

Mr. Schoeneman made his client’s objection to the dismissal known to the Court. (Tr. 267.)

4. **THE GOVERNMENT DID NOT FRAUDULENTLY INDUCE THE APPELLANT TO FILE THE PETITION FOR ARRANGEMENT.**

Assuming representations were made, they are not grounds to dismiss the proceeding.

(a) The referee found that no coercion existed, nor were there misrepresentations made by the Government with the intent to induce filing the Chapter XI petition. (Tr. 166-168.) This finding must be affirmed unless clearly erroneous.

General Order in Bankruptcy 47, 11 *U.S.C.* following § 53 (1952).

There was no coercion. At no time prior to filing the petition did the Department of the Army refuse to accept performance under the contract. As stated by the contracting officer (Tr. 445):

“Question: Are both the contracts in full force and effect?”

Answer: Both in full force and effect.

* * * * *

Question: Were there any shipping instructions in that letter?

Answer: No, there were no shipping instructions in that letter. The contracts were in full

force and effect. The Government stood ready to furnish inspectors to inspect and accept wrenches offered."

And the testimony of Coy C. Goodrich is to the same effect (Tr. 229):

"Question: But you were informed that even if you did not get under Chapter XI, they would accept physical delivery of the items for whatever credit they would be worth. They would be accepted. Is that right?

Answer: Yes."

The Government did not promise to supply working capital to perform the contracts if a Chapter XI proceeding were initiated. On cross-examination, Coy C. Goodrich admitted that there was no promise that money would be forthcoming. (Tr. 228.) He stated that the Government officials informed him that the money *could* be paid. And the affidavit of Goodrich's attorney, A. J. Scampini, further affirms that discussions as to available funds were in the preliminary negotiation stage. (Tr. 56.) The affidavit indicates (Tr. 57) that the first agreement concerning money was reached on June 8, 1954, and the agreement was that funds would be made available from time to time. This agreement was reached subsequent to the filing of the petition of May 24, 1957, and accordingly, could not be an inducement to file.

The true situation is apparent. The Government was concerned over performance of the contracts. However, it hesitated to advance any further funds, in view of the appellant's financial difficulties. Repre-

sentatives of the Government no doubt stated that if a Chapter XI proceeding were instituted to protect further advances, then it might be possible to arrange for progress payments in excess of the amounts limited by the written contract. However, no promise to make funds available was ever made. This is the conclusion drawn by the referee, and the conclusion supported by the evidence.

(b) The alleged misrepresentations are no grounds for a dismissal. The appellant was aware of the documents being filed, and the type of proceeding being initiated. The mistakes or misrepresentations were extraneous to the arrangement proceeding. The appellant knowingly invoked the jurisdiction of the Court and instituted the arrangement proceeding. In *Gersing v. Shinberg*, 140 F.2d 706 (D.C. Cir. 1944), the petitioners moved to dismiss a voluntary bankruptcy petition on the grounds that they were tricked into filing the petition, and that therefore their filing was not in good faith. The Court refused to dismiss the petition. And, in *In re Epstein*, 12 F.Supp. 450 (E.D.N.Y. 1935), the petitioner was induced to file by a mistake as to the effect of the discharge awarded him. The Court refused to dismiss the petition on grounds of any mistake.

Similar to the instant case is *Guterman v. Parker and Company*, 86 F.2d 546 (1st Cir. 1936), cert. denied, 300 U.S. 677. In that case the allegation was made that the petition was induced by attempts of an attorney to gain fees in bankruptcy. The petition was not dismissed, since those matters do not affect the in-

tegrity of the petition. And in *In re Weare*, 87 F. Supp. 413 (S.D.N.Y. 1949), the bankrupt attempted to dismiss the petition on the grounds that he believed he could retain certain funds. The Court denied the motion to dismiss. See also *In re Browne*, 30 F.Supp. 157 (E.D.N.Y. 1939).

The import of these decisions is clear. Where the fraud or misrepresentation is fraud or misrepresentation in the inducement—the motive for filing the petition—it will have no effect upon the petition's validity. The referee recognized this principle. Accordingly, he excluded evidence tending to show promises and representations to the appellant. He was aware of facts which enabled him to determine the nature of the fraud which the appellant complained of. Such fraud was no basis for dismissal, and the referee and District Court so held.

CONCLUSION.

There was no error in amending the petition to reflect the true identity of the petitioner. Nor, was there any error in refusing to dismiss the petition. The decision of the District Court should be affirmed.

Dated, June 19, 1957.

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Attorneys for Appellee.

NO. 15083

IN THE

United States
Court of Appeals
FOR THE NINTH CIRCUIT

MERVIN MOUNCE,

Appellant,

VS.

UNITED STATES OF AMERICA,

Appellee.

OPENING BRIEF OF APPELLANT

*Appeal from the United States District Court
for the Eastern District of Washington
Northern Division*

C. C. ROWAN,
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FILED

JUN 18 1956

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NO. 15083

IN THE
United States
Court of Appeals
FOR THE NINTH CIRCUIT

MERVIN MOUNCE,

Appellant,

VS.

UNITED STATES OF AMERICA,

Appellee.

OPENING BRIEF OF APPELLANT

QUESTIONS PRESENTED

First: Do photographs of persons in the nude, printed in nudist periodicals, used solely to illustrate clean printed matter therein advocating nudism, make the periodicals obscene?

Second: If so, did Congress in enacting 19 U. S. C. 1305 (a) intend to include only those matters "dangerous to the nation?"

Third: If Congress did so intend, has Congress authority to legislate as to matters involving morals only, or is such legislation in conflict with the First, Fifth, Ninth and Tenth Amendments?

Fourth: Does the Act sufficiently standardize the word "obscene" to permit uniform construction and enforcement?

Fifth: Does the Act deny freedom of speech to the advocates of nudism?

STATUTES INVOLVED

19 U. S. C. 1305 (a)

All persons are prohibited from importing into the United States from any foreign country any book, pamphlet, paper, writing, advertisement, circular, print, picture, or drawing containing any matter advocating or urging treason or insurrection against the United States, or forcible resistance to any law of the United States, or containing any threat to take the life of or inflict bodily harm upon any person in the United States, or any obscene book, pamphlet, paper, writing, advertisement, circular, print, picture, drawing, or other representation, figure or image on or of paper or other material, or any cast, instrument, or other article which is obscene or immoral, or any drug or medicine or any article whatever for the prevention of conception or for causing unlawful abortion, or any lottery ticket, or any printed paper that may be used as a lottery ticket, or any advertisement of any lottery. . . Upon the appearance of any such book or matter at any customs office, the same shall be seized and held by the collector to await the judgment of the district court as hereinafter provided; . . . Upon the seizure of such book or matter the collector shall transmit information thereof to the district attorney of the district in which is situated the office at which such seizure has taken place, who shall institute proceedings in the district court for the forfeiture, confiscation, and destruction of the book or matter seized. Upon the adjudication that such book or matter thus seized is of the character the entry of which is by this section prohibited, it shall be ordered destroyed and shall be destroyed. . . In any such proceeding any party in interest . . . may have an appeal or the right of review as in the case of ordinary actions or suits.

28 U. S. C. 1291—Final Decisions of District Courts

The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the District court for the Territory of Alaska, the United States District Court for the District of the Canal Zone, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court.

28 U. S. C. 1294—Circuits in which Decisions Reviewable

Appeals from reviewable decisions of the district and territorial courts shall be taken to the courts of appeals as follows:

(1) From a district court of the United States to the court of appeals for the circuit embracing the district;

28 U. S. C. 1331—Federal Question; Amount in Controversy

The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of \$3,000, exclusive of interest and costs, and arises under the Constitution, laws or treaties of the United States. June 25, 1948, c. 646, 62 Stat. 930.

JURISDICTIONAL STATEMENT

On May 3, 1955, UNITED STATES Customs Officials seized two shipments of nudist periodicals consigned to appellant at Spokane, Washington. The seizure was reported to the District Attorney for the Eastern District of Washington, who filed the libel of information herein. Jurisdiction below arises if at all, under 19 U. S. C. 1305 (a) ; 28 U. S. C. 1331.

District Court, after trial, found 23 of the 27 periodicals obscene and ordered their destruction. Upon motion timely made, the District Court, on January 19, 1956, denied appellant's Motion to Amend the Findings of Fact, Conclusions of Law and Judgment. Notice of appeal from the judgment and from the Order denying appellant's motion to so amend, together with cash bond of \$250.00 was duly served and filed on February 15, 1956.

Jurisdiction of this court arises under 28 U. S. C. 1291 and 1294 (1), as well as 19 U. S. C. 1305 (a).

STATEMENT OF THE CASE

(All Italics Ours)

The facts are undisputed.

Mervin Mounce, herein called appellant, is a charter member of Sunway, a non-profit nudist association, incorporated under the laws of the state of Washington. He is an ex-President of American Sun Bathing Association, the national nudist organization. The association publishes the magazines SUN and SUNSHINE AND HEALTH with nudist photographs therein, in this country to promote their beliefs and ideals. Appellant also imports similar magazines printed in Norway, Sweden, Switzerland, Germany, France, etc., to advance the nudist teachings and beliefs, such imported periodicals being very similar to those published and circulated in the United States. (R. 46, 48). (Compare plaintiff's ex. 1 to 27 with Defendant's ex. 28 to 33).

Some of the periodicals are imported for distribution among the members of the nudist associations and others placed with news dealers with instructions to sell the same only to nudists or potential nudists. (R. 55).

May 3, 1955, two shipments of these periodicals, consigned to appellant, were seized by the customs officials,

and the District Attorney for the Eastern District of Washington filed a libel action for confiscation and destruction of the same as being *obscene* within the purview of Section 1305 (a) of 19 U. S. C.

At the trial, copies of the periodicals were introduced in evidence. (Exhibits 1 to 27). Three witnesses for the Government, not members of any nudist organization examined some of the photographs in the magazines and testified that in their opinion the same were obscene. (R. 112, 126, 169).

Three witnesses for appellant, all members of Sunway testified they were acquainted with the periodicals and that they were not obscene. (R. 52, 100, 118).

Appellant testified the periodicals were being imported solely to promote the nudist movement, 70% of their converts coming from studying the periodicals; that the photographs therein were used only to illustrate the printed data, and illustrate the wholesomeness and health of the human body and the benefits of nudism. He testified the periodicals were not imported for profit although a small profit might be involved; that the nudist people were sincere in their beliefs that nudism is healthful, wholesome, and, contrary to popular opinion, is a sex deterrent; (R. 54, 55, 59) that the juvenile delinquency record for children of nudists is far below the average of the country. (R. 47, 48). A

memorandum decision was rendered by the court. (R. 18 to 24).

At the hearing to correct record errors (R. 136 to 171), six business men and officials of Spokane, Washington, testified that they were not members of, or in any way connected with, any nudist organization and in their opinion the periodicals were not obscene, while one witness testified for the Government that they were. (R. 137 to 171).

The memorandum opinion was not changed and after Findings and Judgment were entered, appellant moved to modify the same which was by the court denied (R. 178). The court found that Exhibits 2, 3, 4 and 16 were not obscene. (R. 26, 27).

It is admitted, and the court found, that the printed contents of all the exhibits are clean and have no indecent, filthy or obscene statements or language calculated to induce lust. (R. 27). The Government's case is predicated solely upon the photographic illustrations which appear throughout the periodicals.

The trial court said:

“Nudity is not per se obscene . . . a publication is not to be judged by one or two isolated illustrations or passages but is to be regarded as a whole . . . the trier of facts must draw the line as best he can between art and pornography . . . the libeled books, with one exception are nudist publications

designed to portray nudist practices and to secure new converts to the movement. Adherents to the cult conscientiously do not regard as objectionable the full display in mixed company of nude male and female bodies. But nudism . . . is in the minority and cannot be said to represent the common viewpoint in this country . . . the character of the printed text in the publications is uniformly unobjectionable . . . so it is really a question of point of view, and if the nudists ever get the majority, why, then, of course, their custom and point of view will prevail." (R. 20, 21, 22, 173).

While the court *concluded* that the periodicals were obscene, *it made no* such finding but found only "that such *pictures are obscene to the average adult person.*" (R. 28).

SPECIFICATIONS OF ERROR

I.

There is no substantial evidence and no "finding" to support the Judgment that the periodicals are obscene.

II.

The judgment is in conflict with the evidence.

III.

The court erred in finding that photographs, illustrating clean printed material are obscene.

IV.

Congress intended the Act to apply only to those restraints "needed for the safety of the nation" (not needed here).

V.

If Congress intended otherwise, the Act is unconstitutional because:

(a) No authority is delegated to Congress to regulate morals or the amount of clothing to be used in photographs, used for illustrations in periodicals.

(b) The Act is prohibited by Amendment I of the Constitution in abridging freedom of speech as to honest beliefs regarding nudism.

(c) The Act invades rights reserved to the States, namely, to regulate the morals of its people, and is contrary to the Ninth and Tenth Amendments.

(d) The Act is not sufficiently certain to permit uniform construction and enforcement.

(e) The Act deprives appellant of his liberty and property without due or uniform process, contrary to the Fifth Amendment.

VI.

As construed by the trial court, the Act is discriminatory between beliefs and teachings as to health and morals.

SUMMARY OF ARGUMENT

All the printed context of the periodicals advocating the benefits of nudism are admittedly clean and proper and is so found in the memorandum opinion. Appellant contends that photographs of persons in the nude, printed in such periodicals solely to illustrate the clean context, do not make the periodicals obscene under the rule stated by the United States Supreme Court.

On its face, 19 U. S. C. 1305 (a) *purports* to include any periodical which a judge or a jury dislikes or would not have in their homes. The District Attorney frequently asked the question: "Would you permit this periodical in your home?" The trial court held some of the issues of PARADIES obscene and others not.

Clearly if this Act was intended by Congress to regulate the morals of the people through the courts, it is unconstitutional as not within the grant of authority to Congress and is also within the rights reserved to the States.

Furthermore, the word "obscene" is so impossible to standardize that uniform construction and enforcement would be impossible—one court or one jury would construe the periodicals as obscene while another would construe them otherwise. As stated by Mr. Justice Frankfurter:

“It leaves wide open the question as to what person, doctrine or things are sacred” (obscene, in this case).

However, in order not to hold the Act unconstitutional and therefore void, we believe Congress intended, and this court should hold, that the Act was intended by Congress to include only those matters “dangerous to the nation” because the Act begins by covering “treason,” “insurrection against the United States,” “forcible resistance to any law of the United States,” etc.

By construing the Congressional intent to involve only matters regarding “the safety of the nation,” both the constitutional questions and a uniform definition of the word “obscene” become unnecessary.

ARGUMENT

I. THERE IS NO SUBSTANTIAL EVIDENCE AND NO "FINDING" TO SUPPORT THE JUDGMENT THAT THE PERIODICALS ARE OBSCENE.

II. THE JUDGMENT IS IN CONFLICT WITH THE EVIDENCE.

III. THE COURT ERRED IN FINDING THAT PHOTOGRAPHS, ILLUSTRATING CLEAN PRINTED MATERIAL ARE OBSCENE.

Keep in mind, there is no finding that the periodicals are obscene—merely the photographs. PHOTOGRAPHIC ILLUSTRATIONS OF CLEAN PRINTED MATERIAL IN A NUDIST PERIODICAL DO NOT MAKE A PERIODICAL OBSCENE.

The definition of the word "obscene" has been before the courts many times, and they hold unanimously:

1. That nudity per se is not obscene.
2. That publications must be judged as a whole and not by certain parts.
3. Their effect on the salacious is not determinative of their character.

4. If certain parts are obscene, whether obscene for obscene purposes, or merely to illustrate non-obscene treatises.

U. S. v. One Book Entitled Ulysses, 5 Fed. Supp. 182 Affirmed: 72 Fed. (2d) 705.

U. S. v. Levine, 83 Fed. (2d) 156.

Parmelee v. U. S., 72 App. D. C. 203, 113 Fed. (2d) 729.

Walker v. Poppenoe, 149 Fed. (2d) 511.

In the *Parmelee* case, *supra*, the court, after noting that the test applied in the earlier cases was whether the tendency was to corrupt those whose minds are open to such immoral influences, said:

“But more recently this standard has been repudiated and for it has been substituted the test that a book must be considered as a whole.” (P. 731).

What may be considered obscene by one person, or even by one court, may not be obscene to another. For example, to a large group of respectable people, the present Bikini bathing suit is obscene; the costumes of ballet dancers are obscene.

Mr. Justice Douglas, writing for the court in a similar case, said:

“Under our system of Government there is an accommodation for the widest variety of tastes

and ideas . . . What seems to one to be trash may have for others fleeting or even enduring values.”

Hannegan v. Esquire, 327 U. S. 146, pages 157-158. Accord: *Bleistein v. Donaldson Lithographing Co.* 188 U. S. 239.

Nearly 50 years ago a similar statute was invoked to libel a book entitled SEXUAL DEBILITY. The court held that while the book abounded in vulgar terms and was coarse in expressions, the entire book did not indicate *an attempt to corrupt morals or pander lascivious curiosity* and as a whole *was not obscene*.

Hanson v. United States, 157 Fed. 749.

Later, a book entitled MARRIED LOVE was libeled. The book attempted to explain how the sex life of married couples could be made happier and there were many pictures of which the court did not approve. The court held, however, that the book *had a purpose* regardless of whether one agreed with the views of the author, and dismissed the libel action.

U. S. v. Married Love, 48 F. (2d) 821.

In a later case, in an opinion that analyzes the law very clearly (opinion by Judge Hand) the Court defines the term “obscenity” under Webster and Black’s Law Dictionaries and previous court decisions and says:

“Although the book runs counter to the views of many persons, it does not fall within the test of obscenity.”

U. S. v. Book Contraception, 51 F. (2d) 525.

In a later case, a book written by James Joyce, a pioneer in Physiology and psychology, discusses frankly all the elements of life. In an opinion by Judge Augustus Hand, the court said:

“It(lays)bare the souls of . . . intellectuals and . . . outcasts . . . with a literalism that leaves nothing unsaid . . . *numerous long passages contain matter that is obscene under any fair definition . . . yet they are relevant to the purpose of depicting the thoughts of the characters and are introduced to give meaning to the whole rather than to promote lust or portray filth for its own sake . . . if (the erotic passages) . . . are to make the book subject to confiscation, by the same test Venus and Adonis, Hamlet, Romeo and Juliet and the story told in the 8th book of the Odyssey . . . would have to be suppressed . . . works of art are not likely to sustain a high position with no better warrant for their existence than their obscene content . . . nothing in such a field is more stifling to progress than the limitation of the right to experiment with a new technique . . . (the book Ulysses)does not fall within the statute, although it may justly offend many.*” (Italics mine).

U. S. v. Book Ulysses, 72 F. (2d) 705 @ 706-7-8-9

Getting down to periodicals exactly similar to those we have here, the courts have defined “obscenity” as:

“Calculated to lower that standard which we regard as essential to civilization or calculated with the ordinary person to deprave his morals or lead to impure purposes.”

Sunshine Book Co. v. Summerfield, 128 F. Sup. 564 at 567.

The United States Court of Appeals for the District of Columbia, in 1940, spent a vast amount of time and study in a decision, citing almost every previous case that had any bearing upon such matters. The collector of customs had seized six books entitled **NUDISM IN MODERN LIFE**. The United States District Attorney libeled them. The court said that the illustrations which were claimed to be obscene should have been marked with reference to the written text of the books, but even so, they were illustrative of the thought and language of the author and were *not calculated to deprave*, etc., and were therefore not obscene. We quote:

“An age accustomed to the elaborate bathing costumes of forty years ago might have considered obscene the present-day beach costume of halters and trunks. But it is also true that the present age might regard those of 1900 as even more obscene.

“It cannot be assumed that nudity is obscene per se . . . from the teachings of psychology and sociology, we know that the contrary view is held by social scientists.

“Nudity in art has long been recognized as the reverse of obscene. Art galleries . . . art cata-

logues . . . ENCYCLOPAEDIA BRITANNICA, contains nudes, full front view, male and female, and nude males and females pictured together and in physical contact.

"The picturization here challenged has been used in the libeled book to accompany an honest, sincere, scientific and educational study and exposition of a sociological phenomenon and is, in our opinion, clearly permitted by present-day concepts of propriety.

"THE PHOTOGRAPHS USED IN THE BOOK HERE INVOLVED HAVE DEFINITE RELEVANCY TO THE WRITTEN TEXT, EVEN THOUGH THERE ARE NO SPECIFIC REFERENCES THEREIN BY PLATE NUMBER; AND IT CANNOT FAIRLY BE SAID . . . THEY WERE INTRODUCED TO PROMOTE LUST . . . (Caps mine). The illustrations depict better than words . . . the beautiful and healthful methods and activities of a gymnosophic society. They portray them as actually applied in several European countries by many thousands of men, women and children.

"The foolish judgments of Lord Eldon about one hundred years ago, proscribing the works of Byron and Southey, and the finding by the jury under a charge by Lord Denman that the publication of Shelley's QUEEN MAB was an indictable offense, are a warning to all who have to determine the limits of the field within which authors may exercise themselves."

Parmelee v. United States, 113 Fed. (2d) 729 at p. p. 732, 734, 735, 737, 738.

A number of trial courts have held a motion picture showing nude people to be not obscene.

Sunshine Book Co. v. Summerfield
CA No. 3007 — 53 D. C., July 13, 1953.

LeBaron v. Olesen, 125 F. Supp. 53.

State v. Lerner, 81 N. E. (2d) 282.

The nudist periodical SUNSHINE AND HEALTH has been going through the United States mail regularly for over twenty-three years.

A host of modern authorities cited with approval in the Parmelee case, *supra*, agree that nudity does not cause sexual delinquency but that it satisfies curiosity of infants and children about the human body; that it is a positive factor towards a sane and wholesome social order.

Havelock Ellis

Professor Howard C. Warren

Dr. Albert Ellis

A mimeographed outline put out by the New Jersey Congress of Parents and Teachers and based on the Family Education Course of Dr. Mabel Grier Leshner contains this at page 3:

“X. Child should have knowledge of body of opposite sex.

1. See bodies of parents, brothers and sisters, in a natural way.

2. If only child, arrange to have youngster see baby of opposite sex being bathed.

3. Learning information as a part of a natural experience avoids undue curiosity causing 'Peeping Toms'.

4. Knowledge of appearance of bodies of both sexes helps child to grasp quickly the explanation of 'mating,' thus relieving parent of undue embarrassment, since many parents find this question difficult to answer."

The growth of nudity in various fields, in painting, in sculpture, and in medical treatises, textbooks and journals was stressed by the Court of Appeals in the Parmelee case, *supra*.

A collection of da Vinci's drawings was recently published (Leonardo da Vinci on the Human Body, Charles D. O'Malley and J. B. de C. M. Saunders, eds., published by Henry Schuman, New York, 1952) and may be readily and without special permission obtained by any school child at the Library of Congress in Washington and the Public Library in New York City. This volume contains a detailed drawing of the female genitalia (opposite p. 200) and two detailed drawings of cross-sections of a human male and female in the act of intercourse with the penis inserted in the vagina (opposite pp. 204 and 205). Cited in the Parmelee case, *supra*, footnote at page 734.

Human nudes in painting, sculpture and etching are in various museums throughout the country and

school children by the thousands see them. A number of these nudes, as the court pointed out in the Parmelee case, are reproduced in such a conservative publication as the *ENCYCLOPAEDIA BRITANNICA*, which school children consult every day.

To the same effect see:

Gay, on Going Naked, pages 54-56, 163.

F. and M. Merrill, Among the Nudists, pages 135-143, 247.

Nudism Comes to America, pages 299 ff.

Parmelee, The New Gymnosophy, pages 299 ff.

Royer, Let's Go Naked (translation from the French) Pages 192 ff.

Havelock Ellis in his *Studies in the Psychology of Sex*, Vol. 3, *The Evolution of Modesty*, page 39, quoted with approval in the Parmelee case at page 732, says:

“Nakedness is always chaster in its effects than partial clothing. . . Venus herself, as she drops her garments and steps on the model-throne, leaves behind her on the floor every weapon in her armory by which she can pierce to the grosser passions of men.”

Thus, it is not nudity but partial clothing that leads to sexual stimulation. It is the strip tease, as its very name implies, it is the art of a Gypsy Rose Lee, the

plunging neckline of a Faye Emerson, the sarong of a Dorothy Lamour, the sweaters on sweater girls and bikini bathing suits, and not nudism, that lead to sexual excitation.

Judge Frank said in his concurring opinion in

Roth v. Goldman, 172 F. (2d) 788, at P. 792 (CA2) Cert. Den. 337 U. S. 938.

“Psychological studies in the last few decades suggest that all kinds of stimuli—for instance, the odor of lilacs or old leather, the sight of an umbrella or a candle, or the touch of a piece of silk or cheesecloth—may be provocative of irregular sexual behavior. . .”

Finally a case involving similar periodicals should be controlling here.

The nudist periodicals *SUNSHINE AND HEALTH* and *SUN* were denied the use of the mails by the Postmaster General as being obscene within the purview of a similar statute. The Postmaster General said “while the written material was not obscene, the pictures in the magazine were obscene.” (In effect what the trial court held here).

Respondents asked for injunctive relief in the District Court of the District of Columbia on July 13, 1953. Judge Schweinhaut held that the periodicals as a whole were not obscene. The Postmaster General appealed and on December 16, 1954, the Court of Ap-

peals affirmed the decision, and quoted with approval from the *Parmelee* case, *supra*. *The appellate court even indicated there might be a question of the constitutionality of the statute involved*, but stated it was not required to pass on that point because the periodicals were not obscene.

Summerfield v. Sunshine Book Co. 221 Fed. (2d) 42.

The Postmaster General applied to the Supreme Court of the United States for a Writ of Certiorari, which on May 9, 1955, was denied.

Sunshine Book Co. v. Summerfield, 349 U. S. 921, 99 L. Ed. 1253, 75 S. Ct. 661.

In evidence here are copies of SUN AND HEALTH and of SUN, (Ex. 30-31), which were held by the CCA D. C. not to be obscene. Comparison with the periodicals here indicate no material difference whatever between the periodicals. All are printed and published for the purpose of promoting the nudist movement and contain pictures of nudes. None are calculated or intended to do anything except advocate the healthfulness and wholesomeness of the entire human body and every part thereof.

Translations of the printed material opposite the pictures that might be most nearly objectionable, were admitted in evidence, and we find not a word of obscenity, filth, dirt or indecency of any kind. The

pictures merely illustrate the wholesomeness of the entire nude human body.

The trial court found that the *photographs* (not the periodicals) placed "emphasis on normally private areas." We respectfully submit that a photograph cannot "emphasize" anything for it *is an exact reproduction of nature*. A painting could emphasize the same, but not a photograph.

Since the evidence shows these periodicals are published solely to promote nudism and since there is not one obscene word in the text and every picture in the periodicals is calculated to illustrate the wholesomeness, healthiness and happiness of nudism, and since nudism is not per se obscene, and the court did not find the *periodicals* obscene, we respectfully submit that these periodicals are not within the purview of the Act involved.

IV. CONGRESS INTENDED THE ACT TO APPLY ONLY TO THOSE RESTRAINTS "NEEDED FOR THE SAFETY OF THE NATION" (NOT NEEDED HERE).

We respectfully submit that Congress did not intend to delve into morals as to private individuals. The entire purpose of the Act appears to be to avoid importation of matters dangerous to *the Nation, the Government and its institutions*. For example, The

Act refers to "treason," "insurrection," "threats of life" and "forcible resistance to law" indicating that Congress intended the word "obscene" to apply only to matters pertaining to Government and Government affairs and institutions, and not to moral concepts of individuals, as determined by customs officials nor even by courts. For example, the Act was intended to prohibit: (1) An obscene picture of our President as such (2) An obscene picture of our Army or Navy; (3) An obscene periodical concerning our courts or federal statutes; (4) An obscene book or magazine concerning the United States or our form of government; or (5) An obscene periodical concerning West Point, the Naval Academy, the American Flag, etc.

The Act can be held constitutional if limited to that definition, and where one of two possible constructions will make a law valid, such construction will be adopted by the court.

As pointed out by Justices Holmes and Brandeis, the First Amendment to the Constitution was intended *to prevent restraints* except those "needed for the safety of the nation."

Leach v. Carlyle, 258 U. S. 138, at 141, 42 S. Ct. 227.

If nudism involves the "safety of the nation" so does Religion, education, sex and gambling. Congress

cannot regulate slot machines used only in intrastate transactions, since that involves only a moral end.

U. S. v. Denmark, 346 U. S. 441, 98 L. ed. 179—74 S. Ct. 190.

In that case in opinions by Justices Jackson and Black, concurring Justices Douglas, Frankfurter, Minton and White, the court said:

“ . . . If sustained (it) would subsequently take into the federal government the entire pursuit of the gambling device . . . a statute that requires the doing of an act in terms so vague that *men of common intelligence* must necessarily guess at its meaning and *differ as to its application*, violates the first essential of due process of law.” 98 L. ed. at 188, 189. (Italics mine).

We find not only officials, but District and Circuit Courts disagreeing upon the meaning of “obscene.” (Compare decision here with *Parmelee*).

Congress did not intend that the importation of a periodical on the west coast would be illegal because a court in the west finds it obscene, while permitting importation of the same periodical on the east coast because a court or jury there finds it not obscene. If so, then some court or jury might find a *Religious* book to be obscene, according to its own standards which would clearly deny freedom of speech.

V. IF CONGRESS INTENDED OTHERWISE, THE ACT IS UNCONSTITUTIONAL BECAUSE:

(a) NO AUTHORITY IS DELEGATED TO CONGRESS TO REGULATE MORALS OR THE AMOUNT OF CLOTHING TO BE USED IN PHOTOGRAPHS, USED FOR ILLUSTRATIONS IN PERIODICALS.

(b) THE ACT IS PROHIBITED BY AMENDMENT I OF THE CONSTITUTION IN ABRIDGING FREEDOM OF SPEECH AS TO HONEST BELIEFS REGARDING NUDISM.

(c) THE ACT INVADES RIGHTS RESERVED TO THE STATES, NAMELY, TO REGULATE THE MORALS OF ITS PEOPLE, CONTRARY TO THE NINTH AND TENTH AMENDMENTS.

The only possible authority for this statute is in "regulation of commerce with foreign countries and between the States," or in the "necessarily inferred" provision, as Congress has only those powers expressly granted by the Constitution or necessarily inferred therefrom.

Railroad Retirement Board v. Alton Railway Company, 55 S. Ct. 758, 295 U. S. 330.

It is not a necessary incident to commerce.

Congress has no general police power and even a national emergency does not create such power.

U. S. v. Lieto, 6 Fed. Supp. 32.

Even the XVIII Amendment was necessary, to enable Congress to legislate as to the importation of

intoxicating liquor, (certainly more dangerous than nudism).

The Harrison Anti-narcotic Act was upheld solely because it was **WITHIN THE TAXING AUTHORITY** of Congress *granted directly* by the constitution. The court indicated that except for the revenue feature, the moral end would have been held unconstitutional.

U. S. v. Doremus, 249 U. S. 86, 63 L. Ed. 493.

And even so, Chief Justice White, and Justices McKenna, Van Devanter, and McReynolds dissented in that case on the ground that the statute was "MERELY AN ATTEMPT BY CONGRESS TO EXERT POWER NOT DELEGATED." (Caps mine).

In the case of

Roth v. Goldman, 172 Fed. (2d) 788.

while there was summary judgment for the Postmaster, Judge Frank, in concurring, said, at page 790:

"... hope that the Supreme Court will review our decision, thus dissipating the fogs that surround this subject ... for those fogs are indeed thick."

and he quotes from Justices Holmes and Brandeis' dissenting opinion in the *Leach v. Carlyle* case, *supra*,

and the concurring opinion of Justice Frankfurter in *Hannegan v. Esquire*, 327 U. S. 146, 66 S. Ct. 456, and then concludes:

“I concur in their decision but with bewilderment.”
P. 798.

In a recent case our court denied Congressional authority over gambling devices:

U. S. v. Three Trade Boosters, 135 Fed. Supp. 24.

(d) THE ACT IS NOT SUFFICIENTLY CERTAIN TO PERMIT UNIFORM CONSTRUCTION AND ENFORCEMENT.

(e) THE ACT DEPRIVES APPELLANT OF HIS LIBERTY AND PROPERTY WITHOUT DUE OR UNIFORM PROCESS, CONTRARY TO THE FIFTH AMENDMENT.

These assignments hinge on the question of whether the Act is sufficiently certain to permit uniform construction and enforcement. If not, it violates the due process clause of the Fifth Amendment.

Recently the U. S. Supreme Court held that the word “sacreligious” was not sufficiently standardized to permit its interpretation by censor officials. Justice Frankfurter wrote a concurring opinion in which he was joined by Justices Jackson and Burton and said:

“But this merely defines by turning an adjective into a noun and bringing in two new words equally undefined. It leaves wide open the question as to what persons, doctrines, or things are sacred.”

Burstyn, Inc. v. Wilson, 72 S. Ct. 777, 96 L. ed. 1098, 343 U. S. 495, at 519.

And in an appendix at page 533, of Justice Frankfurter's opinion, much light is thrown upon the impossibility of defining such words as “sacred, blasphemous,” etc.

In a later decision in which an appeal from a judgment of the Ohio Court and one from a judgment of the New York Court, involving “obscene” films, were combined on appeal, the court said:

“Per curiam. The judgments are reversed” and cited the *Burstyn* case, *supra*.

Superior Films v. Department of Education and Commercial Pictures v. Regents
346 U. S. 587, 98 L. ed. 329, 74 S. Ct. 286.

Finally, a case that should settle permanently what is the supreme law of this country, was decided October 24, 1955. The Supreme Court of Kansas had unanimously upheld a law banning obscene pictures, and attempted to distinguish the facts in its case from those in the *Burstyn* and *Superior Films* cases, *supra*. On appeal to the United States Supreme Court, the memorandum decision reads:

“Per Curiam: ‘Judgment reversed.’ *Burstyn, Inc. v. Wilson*, 72 S. Ct. 777, 96 L. ed. 1098, 343 U. S. 495; *Superior Films v. Department of Education*, 346 U. S. 587, 98 L. ed. 329, 74 S. Ct. 286.”

Holmby Productions, Inc. v. Vaughn, et al.
76 S. Ct. 117, 350 U. S. Adv. Reports Nov. 21,
1955, P. 73.

The Act makes it a crime also to import “obscene” matter. Our courts have held that crimes must be defined with appropriate definiteness.

“The vagueness may be in regard to the applicable tests.”

“Standing by itself it would seem to be warrant for conviction for agreement to do almost any act which a judge and jury might find at the moment contrary to his or its notions of what was good for health, morals, trade, commerce, justice or order.”

Musser v. Utah, 333 U. S. 95 at pages 96, 97.

The real question is, is the vagueness of such a character

“that men of common intelligence must necessarily guess at its meaning. . .

“We think fair use of collections of pictures and stories would be interdicted because of the utter impossibility of the actor or the trier to know where this new standard of guilt would draw the line between allowable and forbidden publications.”

Winters v. New York, 333 U. S. 509 at 518-519.

Furthermore the trial court held PARADIES Nos. 40 and 41 (Ex. 3 and 4) were not obscene but that PARADIES Nos. 42, 52 and 53 were.

VI. AS CONSTRUED BY THE TRIAL COURT, THE ACT IS DISCRIMINATORY BETWEEN BELIEFS AND TEACHINGS AS TO HEALTH AND MORALS.

Assuming the Act to be constitutional and intended by Congress to include whatever courts of any part of this country at any given time determine to be obscene, it is an unwarranted delegation of authority. In essence, it would say: "No one shall import anything which courts and juries find to be contrary to the great weight of public opinion." It has no standard by which the nation can be governed and is discriminatory in prohibiting teachings by any certain group whose honest beliefs may differ from those of a certain court. Neither does it have the requisite certainty required by the Due Process clause of the Fifth Amendment, e. g. we have a District Court of D. C. declaring them "not obscene" and the District Court of Washington holding that they are. Constitutions do not change with the varying tides of public opinion and desire.

Administrative control over the right to speak must be based on appropriate standards. The issue here concerns:

“Living law in some of its most delicate aspects. To smother differences of emphasis and nuance will not help its wise development.”

Niemotko v. Maryland, 340 U. S. 268 at P. 273.
95 L. Ed. 267.

We respectfully submit that no such authority was ever intended to be given to Congress and no such authority intended by Congress to be granted to the courts, to make varying and variable decisions; that such construction would make the various courts from time to time, the absolute dictators as to beliefs and teachings concerning morals, a matter, we respectfully submit, which is reserved to State and Local authorities under their police power.

We respectfully submit the judgment should be reversed with instructions to dismiss the Libel of Information.

Respectfully submitted,

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Attorney for Appellant.

NO. 15083

IN THE

United States

Court of Appeals

FOR THE NINTH CIRCUIT

MERVIN MOUNCE,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR REHEARING

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LEECRAFT PRINTING COMPANY

FILED

JUL 27 1957

PAUL P. O'BRIEN, CLERK

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PETITION FOR REHEARING

TO THE HONORABLE THE UNITED STATES
COURT OF APPEALS FOR THE NINTH
CIRCUIT:

The petitioner herein respectfully prays for a rehearing and reversal of the decision of this Court of June 28, 1957, _____ Fed. (2d) _____, affirming a judgment of District Court of the United States for the Eastern District of Washington, Northern Division, which held certain periodicals to be obscene within the provisions of 19 USC. 1305 (a), and ordered their destruction. This petition for rehearing is based upon three substantial grounds not available to petitioner at the time of hearing, and not previously presented, and for substantial grounds presented only indirectly.

ARGUMENT

FIRST

The Roth case is distinguished on fact. It was a criminal action, in which Roth was charged with conduct "calculated" to corrupt and debauch, by appealing to the erotic interest of his customers. We have no such "calculated conduct" here, but only the importation of periodicals, clean as to word content, with pictures illustrating the text, and "calculated" to "secure new converts to the movement." (R. 21)

The Opinion of June 28, 1957, adopts the Opinion of the District Court defining obscene as something which "offends the sense of propriety, morality and decency . . . of the average, normal, reasonable and prudent person of the community in which the publication is circulated." (R. 21)

However, the Supreme Court in Roth describes obscene material as "Material which deals with sex in a manner appealing to prurient interest." (25 U.S. Law Week 4542)

Then the Court defines "prurient" as "Material having a tendency to excite lustful thoughts." (id. at 4542 n. 20)

SECOND

In the Roth case the Court was passing upon the *conduct* of a person, not upon the abstract definition of obscene. Here we have no conduct—or even periodicals—*calculated*

to do anything except secure new converts to the Nudist Movement, and Nudism is found not to be obscene.

In his concurring Opinion in Roth, Mr. Chief Justice Warren said, "It is not the book that is on trial; it is a person. The conduct of the defendant is the central issue, not the obscenity of a book or picture." (25 U.S. Law Week 4545)

Then the Chief Justice continues, "That is all that these cases present to us, and that is all that we need to decide."

Therefore, the actual holding of the Court in Roth is not authority for the determination of the instant case, upon the facts presented.

THIRD

We respectfully suggest that the decision here, while not so intended, in effect, holds that Nudism is obscene.

The uncontradicted evidence is that the pictures are used solely to illustrate nudism. This Court adopts the Opinion of the Trial Court which found "The printed context of the periodicals was clean and have no indecent, obscene or filthy language." (R. 27)

And that the books are "designed to portray nudist pictures and to secure new converts to the movement." (R. 20-21)

"Such *pictures* are obscene to the average person."
(R. 28) (*Italics mine*).

It will be seen, therefore, that, in effect, the Trial Court found, and this Court has affirmed, that nudism is obscene, contrary to the decisions of the Courts in:

Parmalee v. U.S. 113 Fed. (2d) 72;

Summerfield v. Sunshine Book Co. 221 Fed. (2d) 42.

Roth was convicted of mailing material "calculated to corrupt and debauch the minds and morals of those to whom it was sent." When the Jury found he was so "appealing to erotic interest" he was guilty whether or not the material was obscene. If he had taken a picture from a magazine, medical book, or the Art Museum and used it "to appeal to the erotic interest," he would be guilty, even though the picture, in context, might not have been obscene. Nudity is not obscene, and pictures illustrating nudity are not obscene, when used solely for that purpose. But when used "to appeal to the erotic interest," they may become obscene. We believe Mr. Chief Justice Warren was attempting to distinguish between obscenity in the abstract, and the use of something "for obscene purposes," when he said "That is all we need to decide."

Nowhere does the Roth decision even indicate, let alone decide, that if Roth had merely been promoting a Nudist Movement, and not selling the materials, "to appeal to erotic

interest," that the conviction would have been sustained.

The evidence in the instant case is exactly the opposite from that in the Roth case. Here the Trial Court found the books were "designed to portray Nudist practices and to secure new converts," but held them to be obscene because "Nudism is in the minority."

Again the Trial Court found the printed text "uniformly unobjectionable," (R. 20-21); and then found "such pictures are obscene." (R. 28). Clearly the Trial Court was passing on the *pictures* as though not used solely for illustration, after finding they *were* used solely for illustration.

The cases unanimously hold that the "purpose" of a picture or statement makes it obscene or non-obscene; e.g.:

An attempt to corrupt morals of the average person;

An attempt to arouse erotic instinct;

An attempt to portray filth;

An attempt to promote lust;

A purpose to deprave.

Throughout all the decisions the PURPOSE, or general purport of the book, is the determinative factor. That is not the basis of Roth and Kingsley. But here the Trial

Court finds the PURPOSE is to promote Nudism, which is not obscene, and to secure converts to that group. The findings negative any ulterior or obscene purpose. It is admitted, we believe, that Nudism teaches and practices cleanliness, wholesomeness, temperance, abstinence from alcohol and tobacco, antisex and antifilth. The uncontradicted testimony herein so shows. As stated in *Parmalee*, "Nudity in art has long been recognized as the reverse of obscene."

FOURTH

The decision fixes no boundary line for obscenity and might make a work of art obscene, regardless of how it is used, or the purpose of the user.

The Act upon which this action is based sets no standard for defining what is obscene, and one Court may hold these books obscene and another Court may hold they are not obscene. Mr. Chief Justice Warren touched on this point in the *Kingsley* case when he said "There is totally lacking any standard in the statute for judging the book in context . . . It is the manner of use that should determine obscenity. It is the conduct of the individual that should be judged, not the quality of art or literature." (*Kingsley Books, dba, etc., v. Brown*, 107, decided June 24, 1957; 25 U.S. Law Week 4560)

FIFTH

Obscenity depends on the Opinion of the local com-

munity under the Trial Court's decision.

The decision is based on "the judgment of the average, normal, reasonable, prudent persons of the community in which the publication is circulated," in effect, holding that anything is obscene if such local community believes it to be obscene. We immediately wonder who can be determined to be normal—who is reasonable—and who is prudent? If the people of a certain community were one hundred per cent Atheists, and honestly believed that a picture of the Christ was obscene to them, should a Court prohibit the circulation of such a picture in their community by Christians attempting to convert them?

We respectfully suggest that the effect of this decision will not only be far reaching, but will be very confusing as to standards.

SIXTH

The Opinion conflicts with *Ulysses* and *Sunshine Book Co.*

In *U.S. v. Book Ulysses*, 72 Fed. (2d) 705, the Court held that even obscene parts, if used solely to illustrate non-obscene treatises, do not make the book obscene. While here, the Court holds that parts which are obscene, make the periodical obscene, even though used "to secure new converts to the movement," and even though the pictures are used solely to illustrate clean printed material.

In *Sunshine Book Co. v. Summerfield*, 349 U.S. 921, 75 S. Ct. 661, 99 L. Ed. 1253, the Supreme Court denied Certiorari where the pictures were obscene but used only to illustrate clean printed material, almost identical with the periodicals here.

For the foregoing reasons, we respectfully urge this Honorable Court to grant a rehearing on this case in order to harmonize the decision with the decisions of the Supreme Court of the United States.

DATED this 22d of July, 1957.

Respectfully submitted,

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*Attorney for Appellant
and Petitioner.*

CERTIFICATE

I, C. C. ROWAN, Counsel of Record for petitioner herein, hereby certify that in my judgment the foregoing Petition for Rehearing is well founded and that it is not interposed for delay.

DATED July 22, 1957.

C. C. ROWAN

Attorney for Petitioner.

No. 15083

IN THE
United States
Court of Appeals
FOR THE NINTH CIRCUIT

MERVIN MOUNCE,

Appellant,

VS.

UNITED STATES OF AMERICA,

Appellee.

BRIEF OF APPELLEE

*Appeal from the United States District Court
for the Eastern District of Washington
Northern Division*

WILLIAM B. BANTZ,
United States Attorney.

WILLIAM M. TUGMAN,
Assistant U. S. Attorney.

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IN THE

United States

Court of Appeals

FOR THE NINTH CIRCUIT

MERVIN MOUNCE,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

BRIEF OF APPELLEE

JURISDICTION

The statement of jurisdiction as set forth in the appellant's brief, with reference to the statutes therein indicated, is accepted as accurate.

COUNTERSTATEMENT OF THE CASE

Appellant's statement of the case appears to us to be argumentative and not entirely accurate. Accordingly, Appellee deems it necessary to submit its counterstatement of the case.

On May 3, 1955 and May 11, 1955, the United States Customs Service seized certain publications imported by the Appellant from Europe (R. 8-14). It was stipulated between the parties that all the proper procedures were followed by the United States Customs Service (R. 40). On July 22, 1955, the United States filed a libel of information against the publications in the United States District Court for the Eastern District of Washington (R. 3-7). Appellant filed his Answer August 19, 1955 (R. 17). The matter came on for trial before the Honorable Sam M. Driver, District Judge on September 27, 1955.

On October 5, 1955, Judge Driver filed his opinion holding that Plaintiff's Exhibits 1 through 27, with the exception of Exhibits 2, 3, 4, and 16 were obscene and immoral within the meaning of Section 1305(a) of Title 19 of the United States Code.

An additional hearing was held December 30, 1955, pursuant to stipulation of the parties dated September 27, 1955. (R. 135-176).

Findings of Fact and Conclusions of Law and Judgment was filed December 30, 1955. (R. 25-31).

Motion to Amend Findings, Conclusions and Judgment was filed January 9, 1956 and an order denying said motion was entered January 19, 1956. (R. 32-35).

Notice of Appeal was timely filed by Appellant February 7, 1956. (R. 35).

In the Libel of Information the government charged and at the trial sought to prove that the libeled publications were obscene and immoral in that the pictures and photographs contained in said publications would so much arouse the salacity of persons into whose hands they are liable to fall as to outweigh any artistic, scientific or other merits they may have in other persons' hands (R. 6). The District Court found that certain of the publications were obscene and immoral as contended by the government (R. 30, 27, 18-24).

The government also charged in the Libel of Information (R. 6) and sought to prove at the trial that Appellant imported said publications for the purpose of shipping them for profit by express, and without restriction on resale to the general public, to news stands throughout the United States, and the Court so found (R. 27, 22).

In his answer Appellant denied that the imported publications were obscene and immoral and denied the publications were imported for a commercial purpose (R. 15-17). At the trial Appellant sought to show that the publications were not obscene and immoral and that said publications were imported solely to propagate the Nudist movement in the United States.

Appellant reserved all constitutional objections for appeal (R. 40).

QUESTIONS INVOLVED

The principal question raised on appeal is whether or not the libeled publications are obscene and immoral as found by the Lower Court (R. 27, 30, 18-29). Involved in the issue of obscenity is whether or not the publications were imported primarily for the purpose of reselling them, without restriction, to the public at large. Appellant raises on appeal the question of whether or not 19 U.S.C. 1305(a) is violative of the First, Fifth, Ninth, and Tenth Amendments to the Constitution. Appellant also raises the question of whether Congress has the power to prohibit by legislation, importation of obscene matter.

SUMMARY OF ARGUMENT

The dominant theme and effect of the libeled magazines is obscene and indecent.

If all the magazines were only to go to nudists, we would not term them obscene. The fact is, eighty per cent were imported for resale, at a profit, to the general public. Large, full scale photographs of well developed, model type, young women, posing in the nude, consume most of the space in the magazine. Emphasis in the photographs of both males and females is on the genitalia. There has been no attempt to shade or cover these areas. The text in many of the magazines is wholly or in part in foreign language.

There is little market for magazines containing such subject matter except among nudists, the salacious or the young and impressionable. Only twenty per cent of the magazines were destined for nudists. Publications sold through news stands, without restriction, are readily available to those in whom they could arouse salacious and licentious thoughts and deeds.

The possible benefit that might obtain from distribution of the magazines to nudists, we think, is far outweighed by the likelihood that the magazines will arouse the salacity of the reader. We are not persuaded that many converts to the nudist movement

will be gained by distribution of this type of publication to the public.

We do not believe that the candor of the nation is such that wholesale distribution of magazines, obscene and indecent to most, will be countenanced even though a possible benefit will accrue to the nudist movement.

The power of Congress to regulate all incidents of foreign commerce is plenary. Police regulations designed to protect the public morals and safety are a legitimate exercise of the commerce power.

The privileges of free speech and press do not extend to distribution of obscene matter. Even if the "clear and present danger" test were applicable, wholesale importation and distribution of obscene matter would constitute such danger.

The word "obscene" is not fatally vague and indefinite within the Fifth Amendment. 19 U.S.C. 1305(a) is not violative of the Due Process Clause of the Fifth Amendment in that a clear and definite libel procedure is delineated providing for final determination by the United States District Court.

Congress, having the power to occupy the whole field of foreign commerce, has the power to legislate to protect the people of the United States from importation of matter harmful to the public welfare. The Act does not therefore, violate the Ninth and Tenth Amendments.

ARGUMENT

ANSWER TO APPELLANT'S SPECIFICATIONS OF
ERROR I, II AND III

The principal question involved here is whether nudity as portrayed in 27 different magazines involving 9,666 copies renders those magazines obscene.

Nudity is not per se obscene. The word "obscene" and its synonyms do not admit of exact definition. The definition of the word "obscene" has long created a troublesome problem for the courts. Judge Learned Hand suggested in *United States v. Kennerley*, 209 Fed. 119, 121, that "the word 'obscene' be allowed to indicate the present critical point in the compromise between candor and shame at which the community may have arrived at herein and now." Judge Hand, however, adopted the test of obscenity laid down by Lord Cockburn in *Reg. v. Hicklin*, L.R. 3 Q.B. 36, as follows:

"Whether the tendency of the matter charged as obscenity is to deprave and corrupt those whose minds are open to such immoral influences and into whose hands a publication of this sort may fall."

The essence of Lord Cockburn's test of obscenity has been adopted by courts in the United States in a substantial number of cases. In *United States v. Levine*,

83 F. 2d 156 (2nd Cir. 1936), the Court laid down a test of obscenity as follows:

“The standard must be the likelihood that the work will so much arouse the salacity of the reader to whom it is sent as to outweigh any literary, scientific or other merits it may have in that reader’s hands.”

See also *Walker v. Popenoe*, 80 U.S. App. D.C. 129, 130, 149 F. 2d 511, 512 (1945); *Parmelee v. United States*, 72 U.S. App. D.C. 203, 113 F. 2d 729 (1940); *Besig v. United States*, 208 F. 2d 142, 146, 147 (9th Cir. 1953); *Burstein v. United States*, 178 F. 2d 665, 667 (9th Cir. 1950); *United States v. Dennett*, 39 F. 2d 564 (2nd Cir. 1930); *United States v. One Book Entitled “Ulysses”*, 72 F. 2d 705 (2nd Cir. 1934).

In paragraph VI of its Libel of Information (R. 6) the government charged that the libeled publications were immoral in substantially the language of *United States v. Levine, supra*.

It is submitted that paragraph VI of the Libel of Information (R. 6) frames the principal question to be decided here. Would the pictures and photographs contained in the libeled publications so much arouse the salacity of persons into whose hands they might fall as to outweigh any artistic, scientific or other merits they might have in other persons hands?

The government submits that the libeled publications are obscene within the test of obscenity set forth above.

It was alleged in paragraph VII of the Libel of Information (R. 6) that the libeled publications were imported for the purpose of shipping them for a profit to news stands throughout the United States for resale without restriction to the general public. We submit the evidence supports the District Court's finding (R. 22, 23, 27) that a substantial portion of the libeled publications were imported for the purpose of reselling them at a profit to the general public through news stands (R. 47, 56-63, 73, 78-83, 88-90).

Since it is clear that only a limited number of the libeled publications were destined to fall in the hands of bona fide nudists, the question of whether the publications would be obscene to nudists becomes redundant. Indeed, the government will concede that the publications would not be obscene to a bona fide nudist. In view of the fact that substantial numbers of the libeled publications were imported for sale to the general public, the sole question remaining is: "Would the libeled publications arouse the salacity of persons in whose hands they might fall?" It is argued by Appellant that by making these publications available to the general public, converts to the nudist move-

ment would be gained. We doubt that a magazine whose text is either partially or wholly in a foreign language could have much meaning aside from its pictorial content to a person who reads only English.

We do not think it necessary to go into detail about the plaintiff's Exhibits 1 through 27. We think it will suffice to make a few general observations. First, the great preponderance of the pictures in the magazines are of well-developed and proportioned young women. Second, there are few pictures of family groups and activities such as one might expect to find around a nudist camp. Third, pictures are of young men and women placing particular emphasis on the mammary and pubic areas. Fourth, the pictures are large and in the main there is little attempt to shade or cover the pubic or mammary areas. Fifth, a great number of the pictures have been photographed at close range showing in detail all features of the body areas depicted. Sixth, even though much of the printed text is in a foreign language and is uniformly unobjectionable, the publications in evidence have the dominant effect and purpose of showing, not only without restraint but with emphasis, the normally private areas of nude figures of both men and women. Seventh, publications such as *Modelstudier* are not nudist journals. Eighth, the only purpose we can see for the sale of an item such as the bound form of "Helios" (Exhibit No. 27) is to make available to the "reader" a greater number of nude pictures un-

der one cover. Ninth, many of the exhibits were not current at the time of their importation.

We agree with the point made by Judge Driver that the libeled magazines are offensive to the "normal reasonable and prudent person of the community" (R. 21); and that if at the time of its circulation a publication offends the sense of propriety, morality and decency of such average persons, the publication is within the bar of the statute. However, we submit that the evidence in this case shows more than that the publications are offensive to a normal person. We submit that the evidence shows the main purpose (except limited sales to nudists) of importing these magazines was to pander to that section of the public whose curiosity and lust can be aroused by the photographs therein. Further, we submit that it is only among persons in whom salacious thoughts and desires can be aroused that any market for the magazines exists, if for no other reason than that the normal, prudent, reasonable person would find such magazines offensive and obscene. Certainly, no person not literate in a foreign language could derive any benefit from the text of magazines written in a foreign language, his only interest would be in the pictures.

We submit that it is a legitimate exercise of its police powers for the government to endeavor to prevent obscene matter from falling into the hands of those whose salacity may be aroused thereby to the possible detriment of the Nation or its people.

Publications of the type libeled, made available to the public at large, tend to corrupt the moral fiber of the Nation. We suggest too, that the candor of the Nation is not such as to countenance wholesale importation and distribution of matter, which, having no valid purpose, poses a present danger to the Nation and its people.

ANSWER TO APPELLANT'S SPECIFICATION OF ERROR IV

The authority of Congress over interstate and foreign commerce under the Commerce Clause (Art. I, Sec. 8, Clause 3) is plenary, is complete in itself and is subject to no limitations other than those which are imposed by the Constitution. *Gibbons v. Ogden*, 9 Wheat. 1. 6 L. Ed. 23 *Champion v. Ames* (Lottery Case), 188 U.S. 321, 47 L. Ed. 492, 23 S. Ct. 321. The means necessary or convenient to the exercise of the power of Congress over interstate and foreign commerce may have the quality of police regulations. *Hoke v. United States*, 227 U.S. 308, 57 L. Ed. 523, 33 S. Ct. 281, *Champion v. Ames* (Lottery Case), *supra*.

19 U.S.C. 1305(a) is a police regulation restricting importation of obscene matter. Section 1305(a) is constitutional if it is not in conflict with other sections of the Constitution, and if the ends sought to be attained by the regulation are legitimate. *McCulloch v. Maryland*, 4 Wheat, 316, 405, 407. 4 L. Ed. 57.

The end sought to be attained by Congress through its prohibition of obscene matter is, we submit, the protection of public morals. That Congress can legislate to protect the public morals and invoke its police powers in aid thereof we think cannot be seriously questioned. *Champion v. Ames* (Lottery Case) *supra*; *Besig v. United States*, *supra*; *Schindler v. United States*, 221 F. 2d 743, 745 (C.A. 9, 1955).

Appellant advances the proposition that "Congress intended the Act to apply only to those restraints 'needed for the safety of the nation'" (Br. 25). Apparently Appellant takes the position that the Act applies only to importation of matter that poses a direct threat to the Federal Government, its affairs, and institutions. To support this proposition, Appellant lists a number of examples of the types of obscenity he claims are prohibited from importation (Br. 26). We have been unable to find any authority to support Appellant's contention or his examples. Appellant seems to premise his proposition on the fact that Section 1305(a) also prohibits importation of matter urging treason or insurrection. He ignores those clauses of the Act which prohibit importation of matter containing threats to take the life of, or to inflict bodily harm upon, any person in the United States. Other clauses of Section 1305(a) prohibit importation of lottery tickets and drugs or medicines to prevent conception or cause abortion. Surely, Appellant does not intend to argue that the

importation of such articles must pose a threat to the government of the United States and its institutions before the Act may be invoked. Notwithstanding, if the effect of obscene matter is to undermine the moral fiber of all or any segment of the citizens of the United States, we think it follows that such undermining does pose a threat to the Nation.

Section 1305(a) is drawn in the disjunctive. The disjunctive "or" connotes a legislative intent to take the various clauses so separated, separately. 50 Am. Jur. Statutes, Sec. 281.

The construction Appellant places on the word "obscene" is strained. Even if the rule of strict construction, applicable in criminal cases, were applied that rule "does not require that the words be so narrowed as to exclude cases that may fairly be said to be covered by them" nor is it "permissible for the Court to search for an intention that the words themselves do not suggest. *Fasulo v. United States*, 272 U.S. 620, 628, 71 L. Ed. 443, 47 S. Ct. 200; *United States v. Wiltberger*, 5 Wheat. 76, 95. 5 L. Ed. 37. The fact that such cases as *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 96 L. Ed. 1098, 72 S. Ct. 777; *Superior Films v. Department of Education of Ohio*, 346 U.S. 587, 98 L. Ed. 329, 74 S. Ct. 286, and *Musser v. Utah*, 333 U. S. 95, 92 L. Ed. 562, 68 S. Ct. 397 have held the words "sacrilegious," "moral," "immoral," and "public morals" too indefinite to comply with due process is no

indication that "obscenity" is not sufficiently definite. *Winters v. New York*, 333 U.S. 507, 96 L. Ed. 1359, 72 S. Ct. 1002, refers to the "permissible uncertainty in statutes caused by describing crimes by words well understood through long use in the criminal law—"obscene," "lewd," "lascivious," "filthy," "indecent," or "disgusting" and recognizes that those are apt words to describe prohibited publications. See also *Burstein v. United States*, *supra*; *Besig v. United States*, *supra*. The *Burstyn* case, *supra* while recognizing that "sacrilegious" was too indefinite to define, said that "obscene" presented a very different question.

The citation to *Leach v. Carlile* (Br. 26), 258 U.S. 138, 141, 66 L. Ed. 511, 42 S. Ct. 227 is neither in point nor quite accurate. In *Leach*, the Court had before it the question of whether a statute giving the Postmaster General authority to issue "fraud orders" was in violation of the First Amendment. In their dissenting opinion, Justice Holmes with whom Justice Brandeis concurred, said that the First Amendment "was intended to prevent previous restraints." In the next sentence they stated: "We have not before us any question as to how far Congress may go for the safety of the Nation." Appellant cites the *Leach* case, *supra*, for the proposition that the "First Amendment to the Constitution was intended to prevent restraints except those needed for the safety of the Nation." In any event, the decision in *Leach* was concerned with the validity of a law authorizing an

administrative determination. Section 1305(a) specifically provides that the decision as to obscenity lies with the Federal District Court.

United States v. Denmark (Five Gambling Devices), 346 U.S. 441, 98 L. Ed. 179, 74 S. Ct. 190 is not in point. This case was decided on the basis that the United States had no jurisdiction over slot machines in intrastate commerce.

ANSWER TO APPELLANT'S SPECIFICATIONS OF ERROR V AND VI

a. *Congress Has the Authority to Forbid Importation of Obscene Matters Which Are Harmful to Public Morals.*

Hoke v. United States, supra; Champion v. Ames (Lottery Case), *supra; Chaplinsky v. New Hampshire*, 315 U.S. 568, 86 L. Ed. 103, 62 S. Ct. 766; *Beauharnais v. Illinois*, 343 U.S. 250, 96 L. Ed. 919, 72 S. Ct. 725; *Winters v. New York, supra; Robertson v. Baldwin*, 165 U. S. 275, 41 L. Ed. 715, 17 S. Ct. 326; *Gitlow v. New York*, 268 U.S. 652, 69 L. Ed. 1138, 45 S. Ct. 625.

b. *19 U.S.C., 1305(a) Does Not Violate the First Amendment.*

The United States Court of Appeals, Ninth Circuit, has held that the "clear and present danger" test does

not apply to police regulations in interstate commerce. *Schindler v. United States, supra*. Since the Court's ruling was not specifically extended to foreign commerce, and in spite of the fact that Appellant has not specifically raised the point, we deem it advisable to discuss the application of the doctrine to the instant case.

The main purpose of the Constitutional guarantees of freedom of speech and press were said by Mr. Justice Holmes to be "to prevent all previous restraints upon publications as had been practiced by other governments," and they do not prevent the subsequent punishment of such as may be deemed contrary to the public welfare. *Patterson v. Colorado*, 205 U.S. 454, 462, 51 L. Ed. 879, 27 S. Ct. 556. This statement was later expanded and clarified by Justice Holmes as follows: "It may well be that the prohibition of laws abridging the freedom of speech is not confined to previous restraints* * * * * But the character of every act depends upon the circumstances in which it is done. The most stringent protection of free speech would not protect a man in falsely starting fire in a theater and causing a panic. * * * The question in every case is whether the words are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has the right to prevent." *Schenck v. United States*, 249 U.S. 47, 51, 52, 63 L. Ed. 470, 39 S. Ct. 247.

In his concurring opinion in *Whitney v. California*, 274 U.S. 357, 373, 71 L. Ed. 1095, 47 S. Ct. 641, Justice Brandeis, with whom Justice Holmes concurred, held that the rights of free speech and free press were fundamental but were not in their nature absolute; and added that "their exercise is subject to restriction, if the particular restriction proposed is required to protect the state from destruction or from serious injury, political, economic, or moral. * * * That the necessity which is essential to a valid restriction does not exist unless speech would produce, or is intended to produce, a clear and imminent danger of some substantive evil which the state constitutionally may seek to prevent has been settled." Since the decision in *Schenck v. United States*, *supra*, the Courts have had the question of abridgment of the rights of speech and press and the application of clear and present danger doctrine thereto, before them many times. We do not think it will serve any useful purpose to discuss or even to cite most of the cases, because in our view the differences between the decided cases are differences in degree occasioned by the facts peculiar to each case. We do wish, however, to cite from *Dennis v. United States*, 341 U.S. 494, 95 L. Ed. 1137, 71 S. Ct. 857, one of the latest First Amendment cases. In the *Dennis* case the Court, speaking through Chief Justice Vinson, adopted Judge Learned Hand's interpretation of clear and present danger doctrine as follows. "In each case (courts) must ask whether the gravity of the evil, discounted by its improbability,

justified such invasion of free speech as is necessary to avoid the danger." *United States v. Dennis*, 183 F. 2d, 201, 212.

Though the *Dennis* case involved the constitutionality of the Smith Act it seems to us that the test proposed by Judge Hand is applicable to the instant case; and, as Chief Justice Vinson states at page 510, "it (the test) is as succinct and inclusive as any other we might devise at this time." (Material in parenthesis ours.)

If the evidence in the instant case is tested by either the "clear and present danger" test or by Judge Hand's rule, we think no violation of the First Amendment can be found.

The evil sought to be prevented by Congress was serious moral injury to the Nation and its citizens. Such injury could take the form of a disintegration of the moral fiber of the Nation or the form of moral breakdown in an individual, to the detriment of society or of its members. Exposure to the libeled publications might have the effect of furnishing the necessary spark to set off an evil result. We cannot, of course, say that an evil result will actually obtain from exposure to the libeled publications. We can say there is little or no possibility that the libeled publications would accomplish good.

Appellant testified that 80% of the libeled publications go to news stands (R. 73). The text in many of the publications is wholly or in part in a foreign language. There are no restrictions on resale. The major portion of the space in each publication is occupied by large clear pictures of nude people, primarily model type young women. Emphasis in the pictures is on the normally private areas.

The purpose, Appellant says, of selling these publications to news stands is to gain converts to the nudist movement. We do not find Appellant's argument persuasive. We fail to see how many converts to the nudist movement can be gained through public sale of foreign language publications the dominant theme of which is unrestricted display of the human body and all its parts. We are not persuaded either that Appellant realizes only the paltry profit to which he testifies (R. 89, 96).

We submit that the probable result of unrestricted news stand distribution of the publications is that many, and more likely most of the publications, will fall into the hands of individuals who have not the slightest interest in the nudist movement and who in any event would not understand the text. We think it highly probable that some of these publications will fall into the hands of the licentious and salacious. Indeed, we can see no market for a foreign language magazine containing many full blown pictures of

nudes except among the licentious, the salacious, and the curious and impressionable young.

The danger, we think, is real and apparent. The improbability that evil will result is outweighed by the gravity of the evil sought to be prevented, for we submit, that the probability of evil is far greater than the probability that exposure to the magazines will have no effect or a good effect.

Freedom of speech, one of the most valued of our liberties, does not confer license upon any person to burden society with matter that is either harmful or repugnant to the members of that society. The privilege of free speech will not extend to importation of matter harmful to public welfare or morals. *Tyomies Publishing Co. v. United States*, 211 Fed. 385 (C.A. 6) (Obscenity); *Rebhuhn v. Cahill*, 31 F. Supp. 47 (S.D. N.Y.) (Obscenity); *Harman v. United States*, 50 Fed. 921 (D. Kan.) (Obscenity); *Champion v. Ames* (Lottery Case), *supra*, (lottery tickets); *Whitney v. California*, *supra*; *Frohwerk v. United States*, 249 U.S. 204, 206, 63 L. Ed. 561, 39 S. Ct. 249. If the libeled publications are found to be obscene, "the point that the Constitutional guarantee of freedom of speech or of the printing press, is violated, is without merit." *Besig v. United States*, *supra*.

c. 19 U.S.C. 1305(a) Does Not Violate the Ninth and Tenth Amendments to the Constitution.

Congress alone has the power to occupy by legislation, the whole field of interstate and foreign commerce. *Champion v. Ames* (Lottery Case), *supra*. The means necessary or convenient to the exercise of the power of Congress over interstate commerce may have the quality of police regulations. *Hoke v. United States*, *supra*. Congress by enacting Section 1305(a), has not assumed to interfere with commerce carried on exclusively within a state. Paraphrasing *Champion v. Ames* (Lottery Case), *supra*, at page 357, it may be said that "Congress has not assumed to interfere with the completely internal affairs of any state, and has legislated only in respect of a matter which concerns the people of the United States. As a state may, for the purpose of guarding the morals of its own people, forbid all sales of obscene matter within its limits, so Congress, for the purpose of guarding against the evil effect of obscenity and to protect the commerce which concerns all states, may prohibit the importation of obscene matter into the United States."

d. 19 U.S.C. 1305(c) *Does Not Violate the Fifth Amendment.*

Appellant contends that the word "obscene" is so vague and indefinite that the "requisite certainly required by the due process clause of the Fifth Amendment" is not satisfied (Br. 33).

The Courts have uniformly held that the word "obscene" is not fatally vague and indefinite. To the

contrary, the vagueness objection to obscenity has been repeatedly rejected. *Tyomies Publishing Co. v. United States*, *supra*; *Rebhuhn v. Cahill*, *supra*; *Coomer v. United States*, 213 Fed. 1, 5-6 (C.A. 8); *Magon v. United States*, 248 Fed. 201 (C.A. 9). See also *Burstein v. United States*, *supra*; *Besig v. United States*, *supra*; *Swearingen v. United States*, 161 U.S. 446, 451, 40 L. Ed. 765, 16 S. Ct. 562.

It is hard to see how the Due Process Clause of the Fifth Amendment is violated by Section 1305(a). The statute provides a definite and clear procedure for the libel of prohibited material. In addition, the statute provides that the final determination of "obscenity" shall be made by the Federal District Court, and defines the steps necessary to obtain such determination. Here is no delegation of authority to an administrative agency. The determination is for the Courts and the word "obscene" has long been held not subject to objection for indefiniteness.

CONCLUSION

We respectfully submit that the judgment of the District Court should be affirmed.

Respectfully submitted,

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